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No. 3983

1341

United States Circuit Court of Appeals

For the Ninth Circuit.

SPOKANE & EASTERN TRUST COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY, a Corporation,

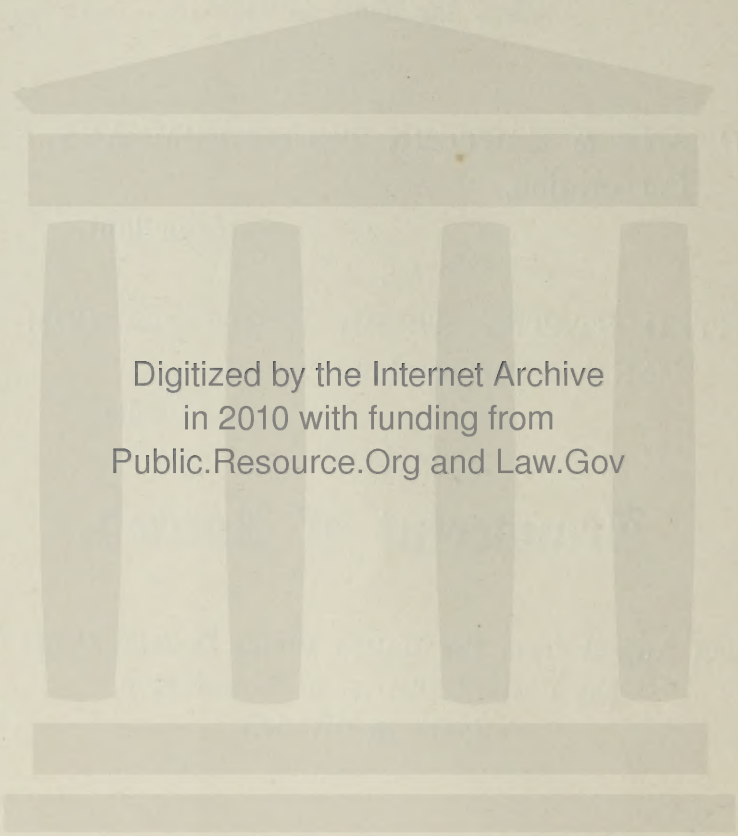
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

FILED
MAR 5 - 1923
F. D. MONCKTON,
CLERK.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.


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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 881.

UNITED STATES STEEL PRODUCTS COMPANY, a Corporation,

Plaintiff,

vs.

SPOKANE AND EASTERN TRUST COMPANY, a Corporation, CENTRAL BANK AND TRUST COMPANY, a Corporation, and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,

Defendants.

Complaint.

Comes now the plaintiff and complains of the defendants and alleges as follows:

I.

That the plaintiff is and during all the times hereinafter mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and a citizen and resident of said State of New Jersey, and located and doing business therein, and was not at any of said times and is not now a citizen or resident of the State of Washington.

II.

That the defendant, Spokane and Eastern Trust Company, is and during all the times herein men-

tioned has been and is now a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and a citizen of the State of Washington, and doing business in the City of Spokane in said State, and a resident and inhabitant of the Eastern District of Washington. That the defendant Central Bank and Trust Company during all the times herein mentioned has been and is now a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and a citizen of the State of Washington, and doing business in the City of Yakima in said State, and a resident and inhabitant of the Eastern District of [2*] Washington, Southern Division. That the defendant E. L. Farnsworth is the Director of Taxation and Examination of the State of Washington and a citizen of the State of Washington, and a resident and inhabitant of the Eastern District of Washington. That the matter in controversy in this action, exceeds, exclusive of interest and costs, the sum and value of three thousand dollars ($3,000.00).

III.

That on the 18th day of January, 1921, Yakima Hardware Company, being then indebted to this plaintiff in an amount exceeding $47,928.74, drew its check for said amount on the Yakima Trust Company, a banking institution of the City of Yakima, Washington, payable to the order of this plaintiff and delivered said check to this plaintiff and this plaintiff thereupon became the owner

*Page-number appearing at foot of page of original certified Transcript of Record.

and holder thereof. That on the 19th day of January, 1921, this plaintiff was, and for a long time previous thereto had been, a customer of the Seattle National Bank, a national banking association of the city of Seattle, in the State of Washington, having deposit account therein, and on said last-named day this plaintiff endorsed said check payable to the order of the Seattle National Bank and delivered the same to the said Seattle National Bank for collection and deposit to the credit of the plaintiff, and the said Seattle National Bank thereupon undertook the collection of said check for the account of the plaintiff. That said Seattle National Bank upon the receipt of said check from this plaintiff agreed with this plaintiff to credit this plaintiff with the proceeds of said check when and if such proceeds should be actually received by said Seattle National Bank and not otherwise.

IV.

That upon the receipt of said check by the Seattle National Bank as aforesaid, it forwarded the same by mail for collection and immediate returns, for the account of this plaintiff, to the defendant Central Bank and Trust Company, a banking corporation of [3] the city of Yakima, which latter bank received said check on the 20th day of January, 1921; and the Central Bank and Trust Company in turn delivered, on said last-named day, said check for collection to Yakima Valley Bank, a banking corporation of said City of Yakima, and the said Yakima Valley Bank duly

presented said check for payment to said Yakima Trust Company and the same was paid on the 21st day of January, 1921, in full by the Yakima Trust Company to the Yakima Valley Bank; and the Yakima Valley Bank on said last-named day turned over all the proceeds so received by it from the collection of said check to the Central Bank and Trust Company, which received the same for this plaintiff. That the proceeds so received by the defendant Central Bank and Trust Company were in the form of certain drafts and bills of exchange.

V.

That when said Central Bank and Trust Company received said check, and for a long time prior thereto and at the time when it received the proceeds from the collection of said check, and at all times subsequent thereto, the said Central Bank and Trust Company was insolvent and was during all said times known to be insolvent by all of its officers and was during all of said times known to be insolvent by the defendant Spokane and Eastern Trust Company. That nevertheless the defendant Central Bank and Trust Company on the 21st day of January, 1921, endorsed and delivered by mail the drafts and bills of exchange so received by it to the defendant Spokane and Eastern Trust Company, which collected all of said drafts and bills of exchange in full and received not later than the 24th day of January, 1921, the money called for by the same, aggregating an amount in excess of the proceeds of plaintiff's said check. That on

said last-named day, and for a long time prior thereto, the defendant Central Bank and Trust Company was indebted in a large amount to the defendant Spokane and Eastern Trust Company, [4] and the latter appropriated to its own use all the funds so transmitted to it, to wit: the proceeds of said draft and bills of exchange and belonging to this plaintiff, by applying the whole thereof to the payment and liquidation *pro tanto* of said indebtedness long theretofore owing to it by said Central Bank and Trust Company, and thereby appropriated said funds belonging to this plaintiff to its own use. That at the time when the defendant Spokane and Eastern Trust Company so received said drafts and bills of exchange and at the time when it received the proceeds thereof, and at the time when it appropriated the same to its own use it had notice and knowledge that the funds so received by it were the proceeds theretofore received by the defendant Central Bank and Trust Company from the collection of plaintiff's said check as aforesaid. That on the 21st day of January, 1921, the defendant Central Bank and Trust Company collected certain other checks drawn on banks in Yakima and theretofore mailed to it by said Seattle National Bank for collection and the amount so collected, together with the amount of plaintiff's check, aggregated the sum of $51,188.04, which the said Central Bank and Trust Company was bound to remit to said Seattle National Bank. That for the purpose of making such remittance the defendant Central Bank and

Trust Company transmitted, on said last-named date, to defendant Spokane and Eastern Trust Company, funds which together with said drafts and bills of exchange above mentioned aggregated a sum in excess of $51,188.04, and drew its draft for said amount on said Spokane and Eastern Trust Company in favor of Seattle National Bank and delivered the same to said Seattle National Bank, which presented the same for payment to defendant Spokane and Eastern Trust Company on the 24th day of January, 1921, and the defendant Spokane and Eastern Trust Company refused and still refuses to honor or pay the same. That the funds so transmitted to said Spokane and Eastern Trust Company by the defendant [5] Central Bank and Trust Company were transmitted for the special purpose, and no other purpose, of providing said Spokane and Eastern Trust Company with funds with which to pay said draft, all of which was known to defendant Spokane and Eastern Trust Company when it received said funds. That this plaintiff has received no part of the proceeds of its said check, nor any benefit therefrom.

VI.

That by reason of the fact that the defendant Central Bank and Trust Company was insolvent at the times aforesaid, it received the proceeds from the collection of said check as a trustee for this plaintiff and held the same in trust for this plaintiff and not otherwise, and had no right to mingle any of the funds so received with any of its other funds, or to make any disposition thereof except

to send the same to the Seattle National Bank for this plaintiff, and the sending of said proceeds to the defendant Spokane and Eastern Trust Company, as aforesaid was a breach of trust, and the defendant Spokane and Eastern Trust Company received the same with notice and knowledge of all the facts herein alleged and that the defendant Central Bank and Trust Company was holding said funds in trust, as aforesaid, and that the receipt thereof by the Spokane and Eastern Trust Company was in violation of such trust.

VII.

That by reason of the facts above stated, the defendant Spokane and Eastern Trust Company received and now holds the sum of forty-seven thousand nine hundred twenty-eight and 74/100 ($47,928.74) dollars as trustee for this plaintiff, but though demand has been made upon the defendant by this plaintiff to turn over and pay said sum to this plaintiff, the defendant has refused and still refuses to pay or turn over any part thereof to this plaintiff. [6]

VIII.

That on the 27th day of January, 1921, the defendant Central Bank and Trust Company, being then insolvent, closed its doors and the Bank Commissioner of the State of Washington, being thereunto duly authorized, took possession of defendant Central Bank and Trust Company as an insolvent bank, and all the assets thereof for the purpose of liquidation, and the said bank and all of its as-

sets have at all times since been and now are in the possession of said Bank Commissioner for said purpose, or in the possession of E. L. Farnsworth as Director of Taxation and Examination of the State of Washington, as hereinafter stated. That after said Bank Commissioner took possession of the defendant Central Bank and Trust Company, as aforesaid, the duties of said Bank Commissioner devolved by law upon the defendant E. L. Farnsworth as Director of Taxation and Examination of the State of Washington, and the said last-named defendant as such Director is now in possession of defendant Central Bank and Trust Company and all of its assets as an insolvent bank for the purposes of liquidation.

IX.

That plaintiff has no plain, speedy or adequate remedy at law.

WHEREFORE, plaintiff prays for the following relief:

That the defendant Spokane and Eastern Trust Company be declared to be a trustee for the plaintiff for the sum of forty-seven thousand nine hundred twenty-eight and 74/100 dollars ($47,928.74), and that plaintiff have judgment against the defendants Spokane and Eastern Trust Company and Central Bank and Trust Company, and each of them, therefor, together with six per cent interest from the 22d day of January, 1921, and for such other and further relief as to the court may seem just

and equitable in the premises, together with plaintiff's costs and disbursements herein.

PETERS & POWELL,
JOHN H. POWELL,
Attorneys for the Plaintiff.

Office and P. O. Address,
546 New York Building,
Seattle, King County, Washington.

Filed in the U. S. District Court, Eastern Dist. of Washington. May 12, 1921. Wm. H. Hare, Clerk. Edwd. E. Cleaver, Deputy. [7]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

IN EQUITY—No. 881.

UNITED STATES STEEL PRODUCTS COMPANY, a Corporation,

Plaintiff,

vs.

SPOKANE AND EASTERN TRUST COMPANY, a Corporation, CENTRAL BANK AND TRUST COMPANY, a Corporation, and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,

Defendants.

Answer of Defendant Spokane and Eastern Trust Company.

Spokane & Eastern Trust Company for answer to the complaint of plaintiff:

1. This defendant has no knowledge as to whether plaintiff is a corporation, and if a corporation, whether it is organized under the laws of the State of New Jersey and a consequent citizen of that state.

2. This defendant admits the citizenship and residence of the several defendants as alleged in paragraph two of plaintiff's bill and admits that the matter in controversy in this action exceeds, exclusive of interest and costs, the sum of three thousand ($3,000) dollars.

3. This defendant is without knowledge as to the several matters and things alleged in paragraph three of plaintiff's bill.

4. This defendant denies that the Yakima Valley Bank, on the 21st day of January, 1921, or at all, turned over the proceeds received by it from the collection of the check alleged in paragraphs three and four of the bill to the Central Bank & Trust Company alleged in the bill, or that said last-named company received the same for this plaintiff. This defendant denies that the proceeds alleged in paragraph four of the bill to have been received [8] by the defendant Central Bank & Trust Company were in the form of certain drafts or bills of exchange. This defendant is without

knowledge as to the other matters and things alleged in paragraph four of plaintiff's bill.

5. This defendant admits that it refused to honor the draft drawn upon it by the Central Bank & Trust Company in favor of the Seattle National Bank, and denies each and every remaining allegation in paragraph five of said bill.

6. This defendant denies the several matters and things alleged in paragraph six of plaintiff's bill.

7. This defendant admits that it refused, and still refuses to pay over the sum of money, or any part thereof, alleged in paragraph seven of the bill, and denies each and every other allegation in said paragraph seven.

WHEREFORE, having fully answered, this defendant prays that plaintiff's bill as to it be dismissed and that it recover its costs.

F. H. GRAVES,
W. G. GRAVES,
B. H. KIZER,
Solicitors for Defendant Spokane and Eastern Trust Company.

Filed in the U. S. District Court, Eastern District of Washington. Sep. 30, 1921. Wm. H. Hare, Clerk. Edwd. E. Cleaver, Deputy. [9]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 881.

UNITED STATES STEEL PRODUCTS COMPANY, a Corporation,

Plaintiff,

vs.

SPOKANE AND EASTERN TRUST COMPANY, a Corporation, CENTRAL BANK & TRUST COMPANY, a Corporation, and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,

Defendants.

Answer of Central Bank and Trust Company and E. L. Farnsworth, as Director of Taxation and Examination of the State of Washington.

Come now the defendants, Central Bank and Trust Company, a corporation, and E. L. Farnsworth, as Director of Taxation and Examination of the State of Washington, and for answer to the plaintiff's complaint herein allege and deny as follows:

1.

Referring to paragraph three (III) of said complaint, these defendants allege that they have no information or knowledge sufficient to form a belief as to the truth or falsity of the allegations therein contained and therefore deny the same.

2.

Referring to paragraph four (IV) of said complaint, these defendants admit that on the 20th or 21st day of January, 1921, the Central Bank & Trust Company received a certain check in the sum of $47,928.74, drawn by the Yakima Hardware Company, payable to the plaintiff herein, which check had been forwarded to the Central Bank & Trust Company by the Seattle National Bank for collection and immediate return, and that the Central Bank & Trust Company delivered said check on the 21st day of January, 1921, for collection to the Yakima Valley Bank, a banking corporation in the city of Yakima, Washington, and that the said Yakima Valley Bank duly presented said check for payment and the same was paid by the Yakima Trust Company on the 21st day of January, 1921, but deny each and every other allegation in said paragraph IV contained.

3.

Referring to paragraph five (V) of said complaint, these defendants admit that on or about the 21st day of January, 1921, the Central Bank & Trust Company endorsed and delivered by mail certain drafts and bills of exchange to the Spokane & Eastern Trust Company, and that said drafts and bills of exchange were collected in full by said Spokane and Eastern Trust Company, and admit that on the said 21st day of January, 1921, the defendant, Central Bank & Trust Company was indebted in a large amount to the defendant, Spokane & Eastern Trust Company, and that the Spokane & Eastern Trust Company appropriated to its own

use all the funds so transmitted to it, to wit, the proceeds of the drafts and bills of exchange, and admit that on the 21st day of January, 1921, the Central Bank & Trust Company collected certain other checks drawn on Banks in Yakima and theretofore mailed to it by said Seattle National Bank for collection, and the amounts so collected, together with the sum of plaintiff's check, amounted to the sum of $51,188.04, and admit that the Central Bank & Trust Company drew its draft in the sum of $51,188.04, on said date on the Spokane & Eastern Trust Company in favor of the Seattle National Bank, and delivered said drafts to said Spokane & Eastern Trust Company on or about the 24th day of January, 1921, and that the defendant, Spokane & Eastern Trust Company, refused and still refuses to honor or pay the same, but deny each and every other allegation in said paragraph V contained.

4.

Referring to paragraph (VI) of said complaint, these defendants deny the same and each and every allegation therein contained.

5.

Referring to paragraph seven (VII) of said complaint, these defendants deny the same and each and every allegation therein contained.

6.

Referring to paragraph eight (VIII) of said complaint, these defendants admit that on the 27th day of January, 1921, the Bank Commissioner of the State of Washington, being thereto duly author-

ized, took possession of the defendant, Central Bank & Trust Company, and all of the assets thereof for the purpose of liquidation, and that said bank and all of its assets have been at all times since said times and are now in the possession of the said Commissioner and E. L. Farnsworth, as Director of Taxation and Examination of the State of Washington. That after said Bank Commissioner took possession of said defendant Central Bank & Trust Company, the duties of said Bank Commissioner devolved by law on the defendant, E. L. Farnsworth, as Director of Taxation and Examination of the State of Washington, and that said last-named defendant, as Director, is now in possession of said Central Bank & Trust Company and all of its assets, acting by and through his authorized deputy.

7.

Referring to paragraph nine (IX) of said complaint, these defendants deny the same and each and every allegation therein contained.

WHEREFORE, these defendants having fully answered plaintiff's complaint, pray that they may be dismissed from said cause and that they have and recover their costs and disbursements herein.

R. J. VENABLES,

Attorney for Defendants, Central Bank & Trust Company and E. L. Farnsworth, as Director of Taxation and Examination of the State of Washington.

And H. B. RIGG,

Of Counsel.

State of Washington,
County of Yakima,—ss.

Harry Coonse, being first duly sworn, on oath deposes and says:

That he is the Special Deputy Supervisor of Banking of the State of Washington engaged in liquidating the Central Bank and Trust Company, a corporation, one of the defendants in the above-entitled action; and that he makes this verification for and on behalf of said defendant being authorized so to do; that he has read the foregoing answer, knows the contents thereof and that the same are true as he verily believes.

(Signed) HARRY COONSE.

Subscribed and sworn to before me this 18th day of July, 1921.

L. HEILMAN,
Notary Public in and for the State of Washington,
Residing at Yakima, Wash.

Due and legal service of the within answer is hereby admitted and copy received in Yakima, Washington, this —— day of July, 1921.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Dec. 23d, 1921. Wm. H. Hare, Clerk. Edwd. E. Cleaver, Deputy.

United States of America,
Eastern District of Washington,—ss.

I, Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Wash-

ington, DO HEREBY CERTIFY that I have hereby compared the foregoing copy with the original answer of defendants Central Bank & Trust Company and E. L. Farnsworth, as Director of Taxation and Examination of the State of Washington in the foregoing entitled cause, now on file and of record in my office at Yakima, Washington, and that the same is a true and perfect transcript of said original and of the whole thereof.

WITNESS my hand and the seal of said Court this 17th day of February, A. D. 1923.

[Seal] ALAN G. PAINE,
Clerk.
Edwd. E. Cleaver,
Deputy.

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 881.

UNITED STATES STEEL PRODUCTS COMPANY, a Corporation,
Plaintiff,

vs.

SPOKANE AND EASTERN TRUST COMPANY, a Corporation, CENTRAL BANK AND TRUST COMPANY, a Corporation, and E. L. FARNSWORTH as Director of Taxation and Examination of the State of Washington,
Defendants.

Memorandum.

PETERS & POWELL, Attorneys for the Plaintiff.

GRAVES, KIZER & GRAVES, Attorneys for the Defendant Spokane and Eastern Trust Company.

RUDKIN, District Judge.

The facts in this case as set forth in the complaint were thus summarized in a memorandum heretofore filed on motion to dismiss: On the 18th day of January, 1921, the Yakima Hardware Company of Yakima was indebted to the plaintiff in the sum of $47,928.74, and drew its check for that amount on the Yakima Trust Company, a banking institution of Yakima, payable to the order of the plaintiff and delivered the same to the plaintiff. At that time and for a long time prior thereto the plaintiff was a customer of the Seattle National Bank, having a deposit account therein, and on the 19th day of January, 1921, the plaintiff endorsed the check thus received from the Hardware Company payable to the order of the Seattle National Bank for collection and deposit to the credit of plaintiff. The Seattle National Bank thereupon undertook the collection of the check for the account of the plaintiff and upon receipt of the same agreed to credit the plaintiff with the proceeds of the check as soon as such proceeds should be actually received by it, and not otherwise. [10] Upon receipt of the check the Seattle National Bank forwarded it by mail for collection and immediate

return for the account of the plaintiff to the Central Bank and Trust Company of Yakima. The latter bank received the check on the 20th day of January, 1921, and in turn, on the same day, delivered the same for collection to the Yakima Valley Bank of Yakima. The Yakima Valley Bank thereupon presented the check for payment to the Yakima Trust Company, and the same was paid in full. The Yakima Valley Bank then turned over the proceeds so received by it to the Central Bank and Trust Company in the form of drafts and bills of exchange, and the defendant Central Bank and Trust Company endorsed and delivered the drafts and bills of exchange thus received to the defendant Spokane and Eastern Trust Company and drew its draft upon the latter for the sum of $51,188.04 in favor of the Seattle National Bank to cover the amount of the check received from the plaintiff, and other items. The funds thus transmitted to the Spokane and Eastern Trust Company by the Central Bank and Trust Company were so transmitted for the special purpose of providing the Spokane and Eastern Trust Company with funds with which to pay the draft and for no other purpose, all of which was well known to the Spokane and Eastern Trust Company when such funds were received. This draft was presented for payment to the Spokane and Eastern Trust Company on the 24th day of January, 1921, and payment refused. During this period the defendant Central Bank and Trust Company was indebted to the Spokane and Eastern Trust Company in excess of the amount of the draft, and the

funds received to meet the draft were appropriated and applied by the Spokane and Eastern Trust Company to the payment and partial liquidation of the indebtedness of the Central Bank and Trust Company. At the time of the receipt of the first mentioned check for collection, and for a long time prior thereto, the Central Bank and Trust Company was insolvent and such insolvency was fully known to its officers and to the defendant the Spokane [11] and Eastern Trust Company.

The proof falls short of sustaining the allegations of the complaint in one respect only. While the complaint avers that the Yakima Hardware Company check was presented to the Yakima Trust Company by the Yakima Valley Bank for payment, and that the latter bank received payment in full and turned over the proceeds to the Central Bank and Trust Company in the form of drafts and bills of exchange, the proof shows that the check was in fact paid through the Yakima Clearing-house; that the Central Bank and Trust Company was not a member of that body but cleared through the Yakima Valley Bank; that the former carried a small balance with the latter; and that the drafts and bills of exchange forwarded to the Spokane and Eastern Trust Company came from the general balance in the Yakima Valley Bank on the day in question. In all other respects the allegations of the complaint are fully supported by the proof.

It further appears that the relations between the Spokane and Eastern Trust Company and the Central Bank and Trust Company were at all times very

close; that the former rediscounted all paper of the latter deemed liquid or available for that purpose; that an employee of the Spokane and Eastern Trust Company was specially employed by the Central Bank and Trust Company to look after these rediscounts; that this employee communicated daily with his former employer and kept it fully advised as to the ups and downs of the Central Bank and Trust Company, if indeed the word ups finds any place in this record; and finally warned it that if it refused payment of the draft in favor of the Seattle National Bank the Central Bank and Trust Company must close its doors and go to the wall.

Much was said on the argument about the banking laws of the state, the decisions of our Supreme Court, the commingling of funds, and the relations ordinarily existing between different [12] banks in transactions of this kind. But inasmuch as the case will doubtless go to a higher court, I will not discuss these different questions at length. Suffice it to say that after giving full consideration to the arguments of counsel and the authorities cited I am firmly convinced that under the circumstances disclosed by this record one bank should not be permitted to nurse another along in this way until it finds a favorable opportunity to seize the money of some innocent third party to square its accounts, and then abandon its nursling to the tender mercies of bank examiners and receivers. Such a course is forbidden alike by sound law and good morals. Whether the plaintiff is entitled to recover the full amount of its claim I need not discuss, as it

was admitted by counsel on the argument that it was only entitled to share *pro rata* in the proceeds of the drafts and bills of exchange.

A decree will therefore be entered in favor of the plaintiff upon that basis.

Filed in the U. S. District Court, Eastern District of Washington. May 10, 1922. Alan G. Paine, Clerk. Edwd. E. Cleaver, Deputy. [13]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 881.

UNITED STATES STEEL PRODUCTS COMPANY, a Corporation,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY, a Corporation, CENTRAL BANK and TRUST COMPANY, a Corporation, and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,

Defendants.

Stipulation Re Certain Promissory Notes and Choses in Actions.

In this cause the Court having ruled that defendant, Spokane & Eastern Trust Company, is entitled in the decree to have provision made for the return to it of all promissory notes and choses in action, being the rediscounts and securities charged

back against the Central Bank and Trust Company by the Spokane & Eastern Trust Company by the close of business on the 25th day of January, 1921, a list of which is hereto attached, the defendant Central Bank and Trust Company and E. L. Farnsworth, as Director of Taxation and Examination of the State of Washington, contest the right of defendant Spokane & Eastern Trust Company to such a provision in the decree. However, as the Court has so ruled and as it will be necessary to take some details of evidence to identify these several items, either before the Court or before the Master, and the defendant E. L. Farnsworth, as Director of Taxation and Examination of the State of Washington, and Central Bank and Trust Company object to the taking of any further evidence in that behalf, but the Court having ruled it may be taken, now without waiving the objections above expressed, or any of them, or any other objection which might be taken to the said defendants the Central Bank and Trust Company [14] and the said E. L. Farnsworth, in said respects, or any of them, but solely for the purpose of saving the time and labor of making the formal proof, IT IS STIPULATED that such further evidence, if taken, would show the following to be a correct list of said promissory notes and choses in action so charged back:

MAKER	PAYEE	AMOUNT	DATE
Brown, C. O.	Central Bank & Trust Co.	$4,600.00	Oct. 25, 1920
Interest to Jan. 25, 1921		.90	
Paddock, H.	"	1,500.00	Dec. 20, 1920
Interest to Jan. 25, 1921		1.75	
McDermid, A. A. & McDermid, R. C.	"	500.00	Dec. 20, 1920
Interest to Jan. 25, 1921		.58	
Baldozer, A. E.	"	1,100.00	Dec. 20, 1920
Interest to Jan. 25, 1921		1.22	
Kimura, J.	"	3,000.00	Dec. 23, 1920
Interest to Jan. 25, 1921		1.75	
Sunset Fruit & Produce Co.	"	4,000.00	Dec. 23, 1920
Interest to Jan. 25, 1921		2.33	
Small, E. S.	"	5,500.00	Dec. 23, 1920
Interest to Jan. 25, 1921		3.21	
K. T. Produce Co.	"	3,000.00	Nov. 18, 1920
Interest to Jan. 25, 1921		4.67	
Campbell, M. B.	"	2,200.00	Dec. 17, 1920
Interest to Jan. 25, 1921		3.42	

Dated this 24th day of July, 1922.

GRAVES, KIZER & GRAVES,

Attorneys for Spokane & Eastern Trust Company.

R. J. VENABLE and

H. B. RIGG, Of Counsel,

Attorneys for Central Bank & Trust Company.

PETERS & POWELL,

Attorneys for United States Steel Products Company.

Filed in the U. S. District Court, Eastern District of Washington. Aug. 2, 1922. Alan G. Paine, Clerk. Edwd. E. Cleaver, Deputy. [15]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 881.

UNITED STATES STEEL PRODUCTS COMPANY, a Corporation,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY, a Corporation, CENTRAL BANK AND TRUST COMPANY, a Corporation, and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,

Defendants.

Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, IT WAS ORDERED AND DECREED as follows, viz.:

That the United States Steel Products Company, a corporation organized and existing under the laws of the State of New Jersey, do have and recover of and from the defendant, Spokane and Eastern Trust Company, a corporation organized under the laws of the State of Washington, the sum of FORTY-FOUR THOUSAND NINE HUNDRED FORTY-THREE AND 84/100 DOLLARS ($44,943.84), together with interest thereon at the rate of six per cent per annum from the 24th day of January, 1921, and the costs of this action.

That such proportion of any amounts which shall hereafter be paid by the Supervisor of Banking of the State of Washington to the plaintiff herein on account of the liability of the defendant, Central Bank and Trust Company, for the proceeds of the check for which this action is prosecuted, as the whole amount of this judgment against the defendant Spokane and Eastern Trust Company bears to the whole amount of such proceeds, to wit: $47,928.74, shall constitute a credit upon and a payment *pro tanto* of this judgment.

IT IS FURTHER ORDERED AND DECREED, that each and every of the credits given by the defendant Spokane and Eastern Trust Company

[16] to the defendant Central Bank & Trust Company, on or about the 25th day of January, 1921, by the application of the proceeds of plaintiff's said check thereto be cancelled, and that the defendants Central Bank and Trust Company and E. L. Farnsworth, as Director of Taxation and Examination of the State of Washington, upon the payment of this judgment by the defendant Spokane and Eastern Trust Company, return and deliver to the defendant Spokane and Eastern Trust Company all of those promissory notes and choses in action (and any note or chose in action heretofore or hereafter taken by way of renewal or substitute for any of the same) now in the possession of said Farnsworth, as such Director, which were surrendered by the said Spokane and Eastern Trust Company to the said Central Bank and Trust Company on or about the 25th day of January, 1921, in consideration of such credits. In case any of such promissory notes or choses in action, or any renewal or substitute thereof, has been collected, or shall hereafter be collected, by the said defendant Farnsworth, as such Director, the proceeds so collected and to be collected by him (excluding, however, all payments made by offsetting the deposit account of the maker) are hereby ordered and decreed to be paid by him to the defendant Spokane and Eastern Trust Company out of any funds now in his possession or which may hereafter come into his possession as assets of said Central Bank and Trust Company, after deducting therefrom such proportion thereof as the

amount of any dividend or dividends, if any, heretofore declared by him out of the assets of said Central Bank and Trust Company upon any claim or claims of the defendant, Spokane and Eastern Trust Company, and the plaintiff, United States Steel Products Company, shall in the aggregate bear to the whole amount of dividends heretofore declared by him to the creditors of said defendant, Central Bank and Trust Company.

IT IS FURTHER ORDERED AND DECREED, that until this decree shall be performed the said E. L. Farnsworth, as such director, shall continue to hold the notes and choses in action and moneys which this [17] decree directs to be paid to the Spokane and Eastern Trust Company subject to this decree, and may in the meantime collect, in whole or in part, any such notes or choses in action, or accept renewals thereof, and shall hold any moneys so collected likewise subject to this decree.

Said promissory notes and choses in action which, or the proceeds, renewals or substitutes of which, are hereby directed to be turned over or paid to said Spokane and Eastern Trust Company are as follows:

MAKER	PAYEE	AMOUNT	DATE
Brown, C. O.	Central Bank & Trust Co.	$4,600.00	Oct. 25, 1920
Interest to Jan. 25, 1921		.90	
Paddock, H.	"	1,500.00	Dec. 20, 1920
Interest to Jan. 25, 1921		1.75	
McDermid, A. A. & McDermid, R. C.	"	500.00	Dec. 20, 1920
Interest to Jan. 25, 1921		.58	
Baldozer, A. E.	"	1,100.00	Dec. 20, 1920
Interest to Jan. 25, 1921		1.22	
Kimura, J.	"	3,000.00	Dec. 23, 1920
Interest to Jan. 25, 1921		1.75	
Sunset Fruit & Produce Co.	"	4,000.00	Dec. 23, 1920
Interest to Jan. 25, 1921		2.33	
Small, E. S.	"	5,500.00	Dec. 23, 1920
Interest to Jan. 25, 1921		3.21	
K. T. Produce Co.	"	3,000.00	Nov. 18, 1920
Interest to Jan. 25, 1921		4.67	
Campbell, M. B.	"	2,200.00	Dec. 17, 1920
Interest to Jan. 25, 1921		3.42	

Dated this 25 day of July, 1922.

FRANK H. RUDKIN,
Judge.

Filed in the U. S. District Court, Eastern District of Washington, Jul. 27, 1922. Alan G. Paine, Clerk. Edwd. E. Cleaver, Deputy. [18]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 881.

UNITED STATES STEEL PRODUCTS COMPANY,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY, CENTRAL BANK & TRUST COMPANY and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,

Defendants.

Stipulation Re Signing and Certifying Statement of Evidence.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the proposed statement of the evidence hereto attached may be signed and certified by the Judge of the above-entitled court as the statement of the evidence in this cause to be used on appeal from the

final judgment herein in the United States Circuit Court of Appeals of the Ninth Circuit.

Dated this 5th day of December, 1922.

PETERS & POWELL,

Attorneys for Plaintiff.

GRAVES, KIZER & GRAVES,

Attorneys for Defendant, Spokane & Eastern Trust Co.

H. B. RIGGS,

R. J. VENABLES.

Attorneys for Defendants, Central Bank & Trust Co. and E. L. Farnsworth as Director of Taxation and Examination of the State of Washington. [23]

Filed in the U. S. District Court Eastern Dist. of Washington. Jan. 6, 1923. Alan G. Paine, Clerk. Edwd. E. Cleaver, Deputy. Ent. in B. S. & I, Vol. 1, page 681.

In the District Court of the United States for the Eastern District of Washington, Southern Division.

UNITED STATES STEEL PRODUCTS COMPANY,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY, CENTRAL BANK & TRUST COMPANY and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,

Defendants.

Statement of Evidence to be Used on Appeal.

Upon the trial of this cause before the Honorable F. H. Rudkin, Judge of the above-entitled court, the following evidence was introduced on behalf of plaintiff and defendants respectively.

PLAINTIFF'S EVIDENCE.

Testimony of E. G. Townsan, for Plaintiff.

E. G. TOWNSAN testified that he was treasurer of the Yakima Hardware Company, and that that company, in January, 1921, made a check in settlement of an account with plaintiff and mailed such check to plaintiff at Seattle; that the check was subsequently returned to his company and the account of the Yakima Hardware Company was charged with the amount of the check by the Yakima Trust Company. The check was received in evidence as "Plaintiff's Exhibit 1." It is for $47,928.74, drawn by the Yakima Hardware Company upon the Yakima Trust Company, and payable to the United States Steel Products Company. [24]

Testimony of Edward Bray, for Plaintiff.

EDWARD BRAY testified that he was plaintiff's cashier at Seattle; that he received the check marked "Plaintiff's Exhibit 1" and deposited it with the Seattle National Bank to plaintiff's credit in the regular way. The deposit slip shown the witness was the one under which the check was de-

(Testimony of Edward Bray.)

posited and was received in evidence. There was printed upon the deposit slip the following:

"In receiving checks or other items on deposit payable elsewhere than in Seattle this bank assumes no responsibility for the failure of any of its direct or indirect collecting agents, and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these conditions items previously credited may be charged back to the depositor's account."

Testimony of J. H. Miner, for Plaintiff.

J. H. MINER testified that he was assistant cashier of the Seattle National Bank. Being shown Plaintiff's Exhibit 1, he stated that the endorsement on the back of it was the regular endorsement stamp for collection of out of town items; that the check was enclosed in the regular cash remittance letter of 19th January, 1921, addressed to the Central Bank & Trust Company of Yakima and placed in the mail. The witness was shown a carbon copy of the remittance letter in which the check was forwarded to the Central Bank & Trust Company and identified it. The remittance letter contained the following words:

"We enclose for returns the following cash items: Do not protest items $25.00 or less, or items which bear this stamp . . N. P. 19–7 or similar authority of a preceding endorser, or the words . . . No. Pro. Wire nonpayment of items $250.00 or over. Deliver documents only on pay-

(Testimony of J. H Miner.)

ment of drafts attached, unless otherwise instructed.

H. C. MacDONALD,
Cashier."

The witness further testified that the remittance letter went to the Central Bank & Trust Company on 19th January and that the Seattle National Bank had never received any return from that remittance; that the total amount of the remittance letter was $51,188.04, the items represented being checks drawn on various Yakima banks; that the Central Bank & Trust Company sent a draft to the Seattle National Bank in payment of the remittance letter; that the draft was presented in due course to the Spokane & Eastern Trust Company and payment refused; that the presentment was made on 26th January, 1921. The draft was for $51,188.04 drawn upon the Spokane & Eastern Trust Company by the Central Bank & [25] Trust Company, payable to the Seattle National Bank and was protested on account of nonpayment on 26th January, 1921. [26]

The witness further testified that when the remittance letter was sent by the Seattle National Bank to the Central Bank & Trust Company that the Central Bank was not charged with the items, but there was simply a memorandum made that the letter was outstanding unremitted for.

On cross-examination the witness testified that the remittance letter, Exhibit 3, contained several items going to make up the amount of $51,188.04 in

(Testimony of J. H Miner.)

various sums running from 72¢ to $47,928.74; that the last-named item constituted the item in suit, being the check of the Yakima Hardware Company to plaintiff, and such check was remitted in the cash remittance letter with the other items. The witness testified that he understood that there was a suit on the part of other people interested in the items included in this cash letter which was pending in the Superior Court for Yakima County against the Central Bank & Trust Company and the Spokane & Eastern Trust Company to establish a preference for the remainder of the items and to charge the Spokane & Eastern Trust Company therewith, and that the items included in that suit were the remainder of the items included in the cash remittance letter of 11th January which the Seattle National Bank had sent to the Central Bank & Trust Company.

Testimony of George M. Lemon, for Plaintiff.

GEORGE M. LEMON testified that in January, 1921, he was cashier of the Central Bank & Trust Company; that he had authority to sign drafts and his signature was appended to the draft of $51,188.04. He testified that he remembered the remittance letter of 19th January, 1921, from the Seattle National Bank and the check for $47,-829.74 in favor of plaintiff drawn on the Yakima Trust Company by the Yakima Hardware Company, and that such check was collected; that the check came in some time before the morning of 21st

(Testimony of George M. Lemon.)

January and the checks were sorted out, and those on other banks in the city were listed and taken over to the Yakima Valley Bank, the clearing agent for the Central Bank & Trust Company, and deposited in the Yakima Valley Bank for credit to the account of the Central Bank & Trust Company; that the Yakima Valley Bank [27] cleared those checks during the regular day's business, and this check, among others, was paid; that the Central Bank & Trust Company was not a member of the Yakima Clearing-house, but cleared these items through the clearing-house through the Yakima Valley Bank, and that claims against the Central Bank & Trust Company coming through the clearing-house were presented to it through the Yakima Valley Bank; that the Central Bank & Trust Company received from Yakima Valley Bank on January 21, 1921, on account of the balance in its favor on that morning's clearings, exchange from the Yakima Valley Bank amounting to $48,000.00; $3,000 was drawn on the Fidelity National Bank of Spokane and $45,000 was drawn on the Bank of California of Tacoma, and that those drafts were sent to the Spokane & Eastern Trust Company for credit to the account of the Central Bank & Trust Company; that the Central Bank & Trust Company drew a draft on the Spokane & Eastern Trust Company for the total amount of the cash remittance sent ti by the Seattle National Bank, and that draft was mailed to the Seattle National Bank, being Plaintiff's Exhibit 4; that on

(Testimony of George M. Lemon.)

21st January the Central Bank & Trust Company presented other items for collection through the clearing-house and delivered them to the Yakima Valley Bank for clearance; that the total of the actual clearings of the Central Bank & Trust Company on that date was $7,874.55; that those were checks which were drawn locally on local banks; that adding those checks to the amount of the remittance letter would bring the sum total of the items presented by the Central Bank & Trust Company to $58,986.16; that there were certain items against the Central Bank & Trust Company presented to it through the clearing-house by presenting them to the Yakima Valley Bank as its clearing agent, amounting to $9,443.32; and the difference between the amount of items presented by the Central Bank & Trust Company and the amount of the items presented against it on that morning was $49,585.93; that when the Central Bank & Trust Company sent to the Yakima Valley Bank to get the money, it got but $48,000, and that left a balance in the Yakima Valley Bank to its credit of $1,585.93; that the drafts aggregating $48,000 were received on the same day; that when the Yakima Valley Bank received through the clearings checks drawn on the Central Bank & Trust [28] Company it brought them over to the Central Bank & Trust Company, after settling with the clearing-house, and the Central Bank & Trust Company gave a draft drawn on the Yakima Valley Bank in settlement of the clearings, which

(Testimony of George M. Lemon.)

draft was charged to the account of the Central [29] Bank & Trust Company on the books of the Yakima Valley Bank; that on that particular morning the Yakima Valley Bank brought over some $9400 of items drawn against the Central Bank & Trust Company and the Central Bank and Trust Company gave it a check drawn on the Yakima Valley Bank for that amount; that the clearings were brought over between 10:30 and 11:00 o'clock every day; that on the particular day the Central Bank & Trust Company presented about $58,000 of items and got from them only $48,000, the balance being carried in an account with the Yakima Valley Bank and some balance being left to keep its account from day to day; that when the Central Bank & Trust Company took other items over to the Yakima Valley Bank it made a deposit slip and duplicate, and the duplicate slip was initialed as being a receipt of the deposit, practically the same thing as is done with individual deposits. The witness was shown a letter addressed by the Central Bank & Trust Company to the Spokane & Eastern Trust Company under date of 21st January, 1921, the first two items being $45,000 and $3,000, and the sum total of the remittances made that day to the Spokane & Eastern Trust Company, being $48,594.60. The letter was received in evidence and marked "Plaintiff's Exhibit 5."

On cross-examination the witness testified that the Central Bank & Trust Company always kept some balance with the Yakima Valley Bank, the

(Testimony of George M. Lemon.)

amount fluctuating from time to time; that he didn't know whether it was required to do so by the Valley Bank or not, but that it had a balance there all the time; that when any deposits were made the account of the Central Bank & Trust Company would be increased, and then that account would be drawn against and decreased, so that it would fluctuate just as an individual's account with any bank fluctuates by deposits being made and checks drawn against it; that in the regular course of business it would take over on each day the items which it had in its possession drawn against other banks in the city of Yakima to the Valley Bank, and that through the clearing-house the Valley Bank would present those items and receive the cash, or its equivalent, upon them, and that the Yakima Valley Bank would also receive, through the clearing-house, all items held by other banks in Yakima against the Central Bank & Trust Company; that the [30] Valley Bank gave the Central Bank & Trust Company credit immediately upon presenting the total amount of the items for the full amount of such items, and that the Central Bank & Trust Company would give the Valley Bank a draft drawn upon itself to cover the amount of items which the Valley Bank had received against the Central Bank & Trust Company, and at the end of the day the balance thus struck would be a credit on the books of the Valley Bank in favor of the Central Bank & Trust Company; that such balance was subject to the disposal of the Central Bank & Trust Company in any way it saw fit, sub-

(Testimony of George M. Lemon.)

ject always to the custom to keep some kind of a balance there; that on 21st January, prior to the taking over to the Valley Bank the items of that day, amounting to $58,986.16, the Central Bank & Trust Company had a balance with the Valley Bank of $43.09; that against the total credit which was given the Central Bank & Trust Company on that day it drew a draft on the Yakima Valley Bank of $9,443.32, leaving a credit with the Yakima Valley Bank of $49,585.93; that the Central Bank & Trust Company then bought two drafts, one for $45,000 on a bank in Tacoma and one for $3,000 on a bank in Spokane; that it took those two drafts and added to it several other items of small amount and transmitted the whole thereof, amounting to $48,594.60, to the Spokane & Eastern Trust Company to be deposited to the credit of the Central Bank & Trust Company; that the Central Bank & Trust Company then had an account with the Spokane & Eastern Trust Company and for a long time had had a standing account with the Spokane & Eastern Trust Company as its Spokane correspondent; that on 21st January, 1921, the books of the Central Bank & Trust Company showed that its account with the Spokane & Eastern Trust Company was overdrawn $16,035.76; that the Central Bank & Trust Company had an overdraft of $17,458 with the Spokane & Eastern Trust Company before it drew the large draft, so that when the remittance of $48,000 reached the Spokane & Eastern Trust Company the amount standing on its

(Testimony of George M. Lemon.)

books to the credit of the Central Bank & Trust Company would be the amount of the remittance, less the overdraft, and that if the large draft which the Spokane & Eastern Trust Company protested was taken out, the Central Bank & Trust Company [31] would have an overdraft of $16,035.76 at the Spokane & Eastern Trust Company. The witness also testified that the Central Bank & Trust Company frequently received similar cash letters to the one in proof from the Seattle National Bank and that the items were cleared through the Yakima Valley Bank in the same way that the one in question was cleared, and that after the collections had been made the Central Bank & Trust Company would draw a draft upon some bank and send it to the Seattle National Bank in payment of it; that the Seattle National Bank would be paid by drawing a draft on some other correspondent and sending it to the Seattle National Bank in payment of the items transmitted for collection; that such was the established method of doing business of the Seattle National Bank and the Central Bank & Trust Company, and that such is the customary way in which banks do business of that sort; that during the time of his connection with the Central Bank & Trust Company it had frequently sent drafts from the Yakima Valley Bank to the Spokane & Eastern Trust Company for deposit to its credit, and that it had frequently drawn drafts on the Spokane & Eastern Trust Company in favor of the Seattle National Bank in payment

(Testimony of George M. Lemon.)

of a balance that might be due, and that the transaction on this particular day was carried through in the ordinary course of business and as any other collection item was put through.

On redirect examination the witness testified that at the close of business on 21st January the Central Bank & Trust Company's account with the Spokane & Eastern Trust Company was overdrawn some $16,000, and that if the Spokane & Eastern had paid the draft of $51,188.04 drawn against it by the Central Bank & Trust Company and sent to the Seattle National Bank in payment of the cash letter, the account of the Central Bank & Trust Company with the Spokane & Eastern Trust Company would have been overdrawn some $17,000; that on 20th January the account of the Central Bank & Trust Company with the Spokane & Eastern [32] Trust Company was overdrawn $17,458.01, and that after the transaction the overdraft was $16,035.76, and that on 21st January there were sent to the Spokane & Eastern Trust Company, in addition to this letter of $48,596, some other items for rediscount, the total of which was $8,094.04; that those items were charged against the account of the Spokane & Eastern Trust Company so that the remittance of 21st January, amounted to $48,596 cash items and $8,094.04 of notes for rediscount, a total of $56,680.64; that those items were deposited with the Spokane & Eastern Trust Company, and a draft for $51,188.04

(Testimony of George M. Lemon.)

drawn against them in favor of the Seattle National Bank. The deposits were necessary to help cover the draft that the Central Bank was drawing against it; that the Central Bank & Trust Company made the deposit with the Spokane & Eastern Trust Company because the Central Bank had to draw a draft of that size against some account in order to remit to the Seattle National Bank.

On recross-examination the witness testified that the books of the Central Bank and Spokane & Eastern Trust Company might not show the same state of the account on the same day; that there would be various reasons why they would not show the same amount; that there might be drafts drawn by the Central Bank against the Spokane & Eastern Trust Company which had not been received by the latter, and that it might be a week or two weeks before they would be received, that if all the items had been in, the overdraft would have been as stated by him, that he didn't know at that time whether the Spokane & Eastern would accept the items for rediscount or not, and that he didn't know whether they had accepted them or not; that under the custom of business between the two banks in some cases the Spokane & Eastern would charge rediscount items back to the Central Bank, but he didn't know whether they did it in all cases or not; that they had a right to, and sometimes they did it and sometimes they didn't; after they had done it they would notify the Central Bank of the fact;

(Testimony of George M. Lemon.)

that the drafts and other items contained in the letter of 21st January were sent to the Spokane & Eastern Trust Company for deposit; that the proceeds of drafts were certainly meant to cover the drafts which the Central Bank drew against the Spokane & Eastern Trust Company; that the drafts outstanding would be paid in the order of [33] their presentation and were expected to be paid in that way, and if some of the outstanding drafts that were on the books of the Central Bank reached the Spokane & Eastern Trust Company before the draft sent to the Seattle National Bank, they would be paid first, provided the Spokane & Eastern Trust Company would stand the overdraft.

Testimony of Charles Heath, for Plaintiff.

CHARLES HEATH testified that he was cashier of the Yakima Valley Bank in January, 1921, and remembered a transaction of clearing through that bank by the Central Bank & Trust Company on 21st January; that the witness Lemon's testimony as to the way in which clearings were made was substantially correct; that on 21st January, the Central Bank & Trust Company brought over to the Yakima Valley Bank $58,918.93 and that the Yakima Valley Bank took over to the Central Bank items received from the Clearing-house and over the counter drawn upon the Central Bank of $9,443.32, and that at the close of clearings on 21st January there was due from Yakima Valley Bank

(Testimony of Charles Heath.)

to the Central Bank $49,563.93, and that it paid over to the Central Bank $48,000 in two drafts. The witness was shown the two drafts, and stated that the one for $3,000 had been paid on January 22d, 1921, and the one for $45,000 had been paid on January 24th, 1921.

On cross-examination, the witness testified that when a draft drawn by one bank on another bank was sent for deposit to the credit of the sender, credit would be given on the day the draft was received, and it would only be charged back in case the draft would not ultimately be paid; that if it should not ultimately be paid, then it would be charged back; that under the clearing-house rules, where a member of the clearing-house clears for a nonmember bank, the member bank guarantees the items of the nonmember bank the same as it would the items of any other customer, and this was the rule under which the Yakima Valley Bank was clearing for the Central Bank; that it was the custom of the clearing-house banks to draw drafts in clearing wherever they were long on funds, i. e., wherever it was most convenient; that these drafts were given in settlement with the Central Bank & Trust Company for the clearings of that day, except a small balance which was left with the Yakima Valley Bank; that it was customary for a nonmember bank to carry a balance with the bank that was clearing for it. [34]

Testimony of C. E. Jolly, for Plaintiff.

C. E. JOLLY testified that he was manager of the Telephone Company at Yakima. He produced two charge tickets showing calls from Yakima to Spokane. The one of 20th January, 1921, showed a call from a person named Buckholtz to Mr. Triplett at the Spokane & Eastern Trust Company; that this was a twelve minutes conversation. It was admitted that Buckholtz was a man formerly in the employ of the Spokane & Eastern Trust Company and was in its employ at the time of the trial, and that Buckholtz was at the Central Bank & Trust Company at that time. The other ticket was for a call dated 10th January from Buckholtz to Triplett, but was cancelled by the Yakima party without an answer. There was also produced by the defendant Spokane & Eastern Trust Company at the request of the plaintiff the bill of charges rendered by the Home Telephone & Telegraph Company of Spokane to the defendant Spokane & Eastern Trust Company covering the month of January, 1921. It showed that Mr. Triplett at Spokane conversed with Mr. Buckholtz at Yakima once on January 22d, 1921, and on three different occasions on January 25, 1921, and that Mr. Rutter at Spokane conversed with Mr. Buckholtz at Yakima once on the 25th of January, 1921.

Testimony of Sikko Barghoorn, for Plaintiff.

SIKKO BARGHOORN testified that in January, 1921, he was president of the Central Bank

(Testimony of Sikko Barghoorn.)

& Trust Company; that on January 25, 1921, at 11:41 P. M. he sent from Pasco, Washington, a telegram directed to Herbert Witherspoon, Vice-president, National City Bank, Seattle, reading: "Sande suddenly decided to charge all due rediscounts to account and refuse Central drafts. Have you hypothecation agreement so surplus Liberties are securities for rediscounts. Protect your interest. Shall try to have the local concerns take it over. You can reach me there. Please inform McDonald, Seattle National." (Signed, "Bargie.") He testified that the expression "Sande" was a short term for the Spokane & Eastern, and the expression "Central draft" meant the Central Bank & Trust Company draft, and that McDonald was the cashier of the Seattle [35] National Bank; that the Seattle National Bank and the National City Bank of Seattle were correspondents of the Central Bank & Trust Company and interested in its affairs; that the Spokane & Eastern Trust Company had notified him on January 25th about half-past three that it had decided to refuse drafts drawn against it by the Central Bank & Trust Company; that Mr. Rutter and Mr. Triplett were the officers who notified him; that the reason why he asked Witherspoon to notify the Seattle National Bank was that that bank was interested in the affairs of the Central Bank & Trust Company; that he was informed by either Mr. Triplett or Mr. Rutter that there were some large drafts outstanding drawn by the Central Bank & Trust Com-

(Testimony of Sikko Barghoorn.)

pany against the Spokane & Eastern, but was not told the exact [36] amount; that the first knowledge he had of that fact was on the afternoon of the 25th January; that when Mr. Rutter, the president of the Spokane & Eastern Trust Company, informed witness that the Central Bank & Trust Company drafts would not be honored, he left for Yakima, leaving Spokane at 6:30, and the telegram was sent from Pasco while he was on his way to Yakima; that he came to Yakima because the Central Bank & Trust Company needed additional assistance, and he went to Yakima to make arrangements locally for additional credit. The witness also testified that he knew W. F. Buckholtz; that Mr. Buckholtz went into the Central Bank & Trust Company in Yakima about the 5th or 6th of January, 1921; that the circumstances under which Mr. Buckholtz came to go with the Central Bank & Trust Company were these: The Central Bank & Trust Company was a large borrower from the Spokane & Eastern Trust Company in the form of rediscounts. Mr. Ellis, the cashier of the Central Bank, did not have a modern method of properly supplying financial statements with the notes that were sent in for rediscount, and therefore there was often a delay before the rediscounts were credited to the Central Bank, at times creating overdrafts, which was very unsatisfactory; that to eliminate that trouble he hired Mr. Buckholtz to go to Yakima and enter the employ of the Central Bank, and part of his duties were to see that the rediscounts

(Testimony of Sikko Barghoorn.)

were submitted in proper form to the Spokane & Eastern Trust Company; that Buckholtz was submitted to him upon his request to the Spokane & Eastern Trust Company for a man who was satisfactory to them; that witness was a director of the Spokane & Eastern Trust Company at that time, but ceased to be such a director on 11th January, 1921; that Buckholtz was specially charged with the interest of the Central Bank & Trust Company so far as the relations of the Spokane & Eastern were concerned; that his purpose in hiring Buckholtz was to eliminate the difficulties that had existed between the Spokane & Eastern and the Central Bank, and in that respect he had more dealings with the Spokane & Eastern than with any other institution; that Buckholtz had charge in the Central Bank of the relations between the two banks. One of the things he did was selecting the paper which was sent to the Spokane & Eastern for rediscount. [37]

On cross-examination the witness testified that when he employed Buckholtz he employed him absolutely as an employee of the Central Bank, and he was paid by the Central Bank; that he had no employment during that time from the Spokane & Eastern except to the extent that rediscounts were sent to him for collection direct; that whether he was paid for that work by the Spokane & Eastern, witness did not know; but that he paid Buckholtz such a salary as had been agreed upon for the Central Bank; that the Banking Department had writ-

(Testimony of Sikko Barghoorn.)

ten witness a letter in December wherein they stated that Mr. Ellis, the cashier of the Central Bank, was not satisfactory to them, and that they wanted him to look out for another man, and when Buckholtz came to Yakima witness had an understanding with him that if he proved efficient he would sooner or later take Mr. Ellis' place; as soon as it could be done without making trouble. He testified further that he first became a shareholder in the Central Bank in May, 1919, becoming its president in January, 1920.

On redirect examination witness testified that Mr. Ellis was the cashier of the Central Bank to the time it closed and Mr. Buckholtz didn't have an official position; that Mr. Ellis was running it; Buckholtz was running his part of the business that was entrusted to him; that their work was not along the same line; that Ellis was supreme in his province and Buckholtz in his; that Buckholtz was to look after the rediscounts with the Spokane & Eastern, the financial statements and making collections on the notes; this applied to the notes that were rediscounted by the Spokane & Eastern and also the notes that had been given to the Central Bank. Witness didn't know whether Buckholtz' employment was ever submitted to the Board of Directors of the bank, but that he remained there from 5th January until the bank was closed on 27th January.

On recross-examination witness testified that commencing late in December and running to the

(Testimony of Sikko Barghoorn.)

time of the failure, it was of the utmost importance that the loans of the bank be collected in as rapidly as possible; that the bank had to make its liquidation; that Ellis was a little easy on enforcing payment in some instances, and that Buckholtz was put in charge of that also with directions to crowd payment just as fast as he could without doing more harm than good by crowding. [38]

On redirect examination witness testified that he came to Yakima with Buckholtz when Buckholtz first went into the Central Bank; that witness remained in Yakima three or four days with Buckholtz; that he went back to Spokane and came back the forepart of the following week and spent several more days; that he then went back to Spokane and took some trips out of Spokane and didn't return to Yakima until the night of 25th January; that he was not present at the directors' meeting of the Spokane & Eastern on 11th January; that when he returned to Spokane after his second trip to Yakima he made a trip to Idaho and one to Colville; that he did not think there was any correspondence between himself and Mr. Buckholtz during the period Buckholtz was in the bank; at least he had none such.

There were introduced a number of letters passing between W. F. Buckholtz at North Yakima and different officers of the Spokane & Eastern Trust Company at Spokane during the month of January, 1921, the letters being put in in one bunch as "Plaintiff's Exhibit 7." They are set out at the last of this statement. [39]

There was introduced in evidence a letter bearing date 5th January, 1921, written by W. T. Triplett, secretary of Spokane & Eastern Trust Company, to B. J. Ellis, cashier of Central Bank & Trust Company, which is as follows:

"January 5, 1921.

"Mr. B. J. Ellis,
Cashier, Central Bank & Trust Company,
Yakima, Washington.

Dear Mr. Ellis:

Referring to your letter of January 3,—we have after talking with Mr. Barghoorn, placed to your credit $12,681.05 to cover the proceeds of the rediscount notes sent by you.

Two of the notes are not altogether satisfactory, —namely those of J. L. Parker and the Western Fruit & Produce Company, but as Mr. Buchholtz, who is one of our right hand men, is accompanying Mr. Barghoorn to-night, he will endeavor to obtain substitution of other paper.

We have taken them in the meantime in order to help you out.

Sincerely,
W. T. TRIPLETT.
(Signed) W. T. TRIPLETT,
Secretary.

R.
Enc."

Testimony of W. F. Buchholtz, for Plaintiff.

W. F. BUCHHOLTZ was called and inquired of as to letters in his possession which he had been subpoenaed to produce. He produced a letter bearing date 10th January, 1921, written by R. L. Rutter, president of the Spokane & Eastern Trust Company, to W. F. Buchholtz, care Central Bank & Trust Company, Yakima, which reads as follows: [40]

"January 10, 1921.

Mr. W. F. Buchholtz,
c/o Central Bank & Trust Company,
Yakima, Washington.

Dear Mr. Buchholtz:

Many thanks for the minutes (St. Joe) which you so kindly signed up and got back to us this morning. I am now sending them to Mr. Betz today.

Mr. McBride is an examiner for the Federal Reserve Bank and not for the State Banking Department, so you need have no concern regarding his examination of your institution at this time. Anyway, he has been ordered back and was to be in Spokane this morning.

I am glad to note that your apple drafts have been reduced so materially and that your float is as low as it is. It is refreshing to receive your full and complete letters and we all want to congratulate you on the strong position you are taking in this matter. If your hypothesis is correct there is no question but what we will do our part. Just

remember one thing, however, and that is that the prices of all the commodities on which you expect to realize funds are on the decline and will probable decline still further in the near future. Consequently, in urging your customers to realize, you are doing them a favor, in my opinion. Whether you are or not does not make much difference for the reason that you have got to get the money.

Conditions are not improving. In fact, they are getting worse for banks which have loans that do not show a proper ratio of quick assets to current liabilities. Bankers seem to consider their deposits are part of their capital. You know only too well that they are not. I expect to see your deposits go off still further with a possible temporary bulge from time to time.

Keep your head up and tail over the dashboard, and pray for strength!

Sincerely,

(Signed) R. L. RUTTER.

R. L. RUTTER."

V? [41]

Another letter was introduced in evidence written by W. T. Triplett, vice-president of the Spokane & Eastern Trust Company, to the receiver of the Central Bank & Trust Company, dated February 2d, 1921, which is as follows:

"February 2, 1921.

The Receiver, Central Bank & Trust Co.,
Yakima, Washington.

Dear Sir:

On December 29, 1920, this bank rediscounted a note of W. E. Turner for $1,050.00 for the accommodation of the Central Bank & Trust Company, with the understanding that the note was fully secured by liberty bonds, and war savings stamps, and that the Central Bank & Trust Company was to hold these in trust for us.

The security has never been forwarded to us, nor was it turned over to Mr. Buchholtz while he was there. We wish you would take this up for us, and if possible forward the security to us.

If the bonds are not in your possession, we would greatly appreciate it if you will ascertain their present location, and advise us accordingly; also any further factors which may have a bearing on this particular loan.

You will find us ready and willing to assist you in any way possible to straighten up any matters which may come up, and we invite your correspondence in connection with it.

On the other hand, there are some items on which we may require some assistance and information on your part, which will be duly appreciated.

Sincerely,
W. T. TRIPLETT.
(Signed) W. T. TRIPLETT,
Vice-president." [42]

(Testimony of W. F. Buchholtz.)

The witness testified that so far as he knew the letters produced were all the correspondence between himself and the Spokane & Eastern during the time he was in the Central Bank; that of the letters written by him, a few were dictated to a stenographer, the remainder were written by himself.

Testimony of Fred Stevens, for Plaintiff.

FRED STEVENS testified that he was one of the bank examiners attached to the State Banking Department for the State of Washington and was engaged in that work in January, 1921; that he came to Yakima on 25th January, 1921, at the request of the Supervisor of Banking; that with other examiners he had been engaged in the work of examining the Spokane & Eastern Trust Company at Spokane, and on the 24th received a call from the Supervisor of Banking to speed up the work at Spokane and take up the examination of the Central Bank immediately; that before he left Spokane he had learned from Mr. Barghoorn of the existence of a large outstanding draft, which later proved to be the draft for $51,000 drawn by the Central Bank on the Spokane & Eastern in favor of the Seattle National Bank; that he either heard of this from Mr. Barghoorn or from the officers of the Spokane & Eastern, and that there was doubt expressed as to whether it would be honored, and from the results of his conversation with Mr. Barghoorn he was given the impression

(Testimony of Fred Stevens.)

that it was not to be honored; that on the night of 25th January he went from Spokane to Yakima, getting into Yakima late at night. Mr. Barghoorn was on the same train. The following morning, with other examiners, he went to the Central Bank; that knowing the condition of the bank being called on to meet a large withdrawal, he disregarded the usual procedure in counting the cash to look at the balance sheet, and at a glance saw that heroic measures were necessary to [43] establish whether the bank would be able to provide funds for meeting the draft; that he was also informed that the Central Bank had appealed to the local clearing-house of Yakima for aid, and his efforts were directed toward bringing that about as quickly as possible, either by the local banks purchasing rediscount notes, or else taking over its deposit liabilities. This was on the 26th and he told of the efforts he made during the morning of that day to enlist the assistance of the local banks of Yakima to tide over the situation. The witness then testified as follows: "That the meeting then adjourned until evening, at which time a number of credit men from the members of the Yakima Clearing-house Association was augmented and a more exhaustive analysis made of the paper, and as the figures for losses were developed, that is, in the judgment of these credit men, they seemed to be in a constantly ascending volume, and it looked that at one time after wiping out the capital and surplus and undivided profits of the Central Bank & Trust Com-

(Testimony of Fred Stevens.)

pany through losses, there would be a deficit loss, at one time we figured, of $75,000.00 or some such matter. . . . " The local clearing-house banks undertook to donate first $25,000, and then went to $50,000. The witness did not consider that sufficient and undertook to secure gratuities from other sources. He called up the Spokane & Eastern Trust Company and it offered to donate $15,000. He also got in communication with the Seattle National Bank of Seattle, and while he was assured something would be done, no definite amount was named. Then the Yakima banks intimated that they would put up $80,000 if other contributions could be had from other sources. The witness again called up the Spokane & Eastern and was told that it would raise its amount to $20,000. The matter rested there, with some of the members of the local clearing-house willing to shoulder their part and others unwilling to do so, and the meeting "kind of petered out" along in the small hours of the morning of the 27th. Along about 11:00 o'clock the examiners concluded they could not get any definite action taken, and closed the bank. The witness testified that he and the other examiners put in the whole day of the 26th trying to effect something to save the bank, and did not close it until the morning of the 27th when it appeared as though nothing could be done. He testified, also, that when he took charge of the Central Bank and proceeded to make an inventory of [44] its assets, certain notes could not be found, and Mr.

(Testimony of Fred Stevens.)

Buckholtz informed him that he, Buckholtz, had them, and that he had taken them out on the evening of the 26th. Buckholtz told the witness that these notes were items belonging to the Spokane & Eastern Trust Company; that they were items it had purchased from the Central Bank, bills payable, rediscounts, and collateral in connection therewith. The witness demanded the surrender of the property which Mr. Buckholtz refused to surrender, saying that the notes were under his personal control, that he had rented one of the bank's safety deposit boxes into which he had put the matters belonging to the Spokane & Eastern and that the Central Bank and the examiner had no interest therein. He let witness inspect the package, and witness made a record of the matter and sent it to Olympia. During this transaction witness was informed by Mr. Buckholtz that he had communicated by long distance telephone with Spokane. Witness subsequently discovered that with the exception of one or two that were a mistake, the items which Mr. Buckholtz had in his possession belonged to the Spokane & Eastern Trust Company. Mr. Buckholtz made an affidavit in connection with this matter, setting forth certain collateral and notes held by him and stating that it included all which was held by him which had been obtained from the Central Bank & Trust Company. It was conceded that he took such notes and collateral at the request of the Spokane & Eastern Trust Company as belonging to them. The witness testified

(Testimony of Fred Stevens.)

that when he went to the Central Bank on the morning of 26th January, he found Mr. Ellis, Mr. Buckholtz and Mr. Lemon in the banking-room; they were all in the same room. The capital stock was $50,000.00. [45]

On cross-examination the witness testified that the period of deflation throughout Eastern Washington, Northern Idaho and Western Montana started in the fall of 1920, becoming noticeable particularly in the last month or two of that year and was at the peak about the time of the failure of the Central Bank; that he would not want to say that during that period of deflation the country banks through the district mentioned were all in difficulty, or a great majority of them were, but that he would say that the pressure for cash became acute and each bank in the community became interlocked with each other for exchange and cash and deposits began to drop; that collections were increasingly difficult because buyers were loath to part with cash and protect their own credit and in a good many cases quotations for actual commodities were in a sense fictitious; that the country banks, through the territory referred to, were dependent in the first instance upon the Federal Reserve System, if they were members of it, and that if they didn't belong to that system they were largely dependent upon the larger city banks unless their affairs were in such shape that they had liquid securities, but that banks that were stressed at all were largely dependent upon the

(Testimony of Fred Stevens.)

larger city banks; that during this period of time the Spokane & Eastern Trust Company was extending liberal assistance to large numbers of the [46] banks throughout the sections referred to; that the exact extent of its assistance to different banks he could not remember, but that, as he recalled, a very considerable part of the loans of the Spokane & Eastern Trust Company were directly to banks, rediscounts or accommodation paper made for the benefit of other banks. The amount of $3,000,000 to $5,000,000, being suggested to the witness as the amount of such loans, he answered that he would say, roughly, that the amount was 33% of the total loans of the Spokane & Eastern; that during that period the average deposits of the Spokane & Eastern were better than $10,000,000, and that in his judgment its affairs during that period were in good shape from a banking standpoint; that it was generally in good shape and a very well-managed bank; that its accommodations to banks extended all over Eastern Washington, what is commonly known as the Inland Empire; that it included Northern Idaho and into Montana and down in Oregon; that its operations in the matter of assistance to other banks were made with the approval of the State Banking Department, and that such assistance was under some circumstances rendered at the solicitation of the State Banking Department; that he had known for a year or more that the Spokane & Eastern was extending assistance and credit to

(Testimony of Fred Stevens.)

the Central Bank & Trust Company; that it took the ordinary form of rediscounts and of direct loans and at times of overdrafts. The witness further testified that Mr. Ellis, the cashier of the Central Bank, had been known to the Banking Department of the state for some years; that he had been criticized as a banker and that in 1921 it was difficult to say whether or not he had mended his ways; that it was difficult to tax guilt in a sense because he had been attached to the Central Bank only a comparatively short time, but that when particular matters came up for criticism or information as to their values he was ignorant in a great many cases of the facts concerning a loan, and that the impression the witness got from the examination [47] was that he was an extreme optimist; that he felt very much dissatisfied with the examination and his letters to the Department expressed the apprehension that Ellis was not the man for the situation; that what was needed was contraction rather than going out and getting business with the inducement of making a loan, the latter being the policy pursued in the Central Bank; that the witness did not mean to reflect upon Ellis' honesty, but upon his competency; that as a result of the witness' examination of the bank, the Deputy Supervisor of Banking wrote a letter to Mr. Barghoorn taking Ellis to task for his past shirking and the fallacy of his policy; that while witness had read the letter he had forgotten whether it was a specific demand for Ellis' removal,

(Testimony of Fred Stevens.)

but at least it was to the point that something of that nature would have to be done. Later on, a specific demand was made. In December the witness was in Yakima in connection with an examination of another bank there, and talked with Mr. Barghoorn, stressing to Barghoorn the absolute necessity for making a change, pointing out that there were many irregularities and details generally in deplorable shape; Mr. Barghoorn said he desired to clean house gradually; that while he realized that Ellis was not pleasing to the Banking Department of the state that he (Barghoorn) entertained sympathy for his wife and children and was loath to make a change on that account, but that he was becoming converted to the idea that a change was necessary and said that as soon as he could get a suitable man he would make a change. He informed the witness that in talking to various bankers he had been trying to get a man that would measure up to the required standard. The witness testified that when he arrived in Yakima on the 26th he went into the bank from the standpoint of conducting an ordinary examination; that while he realized the situation was grave that he did not deem himself in possession of sufficient facts on which to take over the institution, but that the facts which came out during the night of the 26th and the morning of the 27th justified him in doing so; that his investigation of the 26th and 27th led him to believe that with the amount of assistance which had been suggested the trouble

(Testimony of Fred Stevens.)

could have been tided over and the bank survive, and that he believed that subsequent developments had justified his position; that [48] his judgment from the conversation he had with Mr. Barghoorn was that Mr. Barghoorn had no idea but that the bank would be all right until coming over here on the 26th; that he believed Barghoorn had no suspicion whatever that the bank was going to have to close; that while he was cognizant of the danger of a cash shortage, he didn't question the worth of his assets.

On redirect examination the witness testified that the last examination of the Central Bank made by the State Banking Department prior to its closing was in the latter days of June, 1920, and that following the examination recommendations were made to Mr. Barghoorn to remove Mr. Ellis. The reason for the recommendation was that the condition of the Central Bank was too severe a job for Ellis' capacity, and also that the Banking Department had records of his activities in other banks. When the examination in June was made, the Central Bank was found from the accountant's end to be in deplorable shape; there were very little of the matters in balance. Their profit and loss account showed cash over one day and cash short the next, a certificate of deposit entered as one amount and showing up for a larger amount, and a general slovenly condition in matters of detail; that some of the specific acts which, in the opinion of the witness, showed that Ellis was not

(Testimony of Fred Stevens.)

a competent man to have charge of the bank was that prices were then at the peak and the witness formed the conclusion that Ellis judged the worth of his loans by capitalizing such prices and was expecting liquidation of his paper on those prices; that he was an optimist and overestimated the resources of the bank, and was prone to extend credit rather than to contract; that in December, 1920, he explained the difficulty with Ellis, as he saw it, to Mr. Barghoorn; that the reason he did so was Ellis functioned as a credit officer; that he felt the times needed a man of far sterner stuff; that he was informed that the supervisor of banking had written a letter to Mr. Barghoorn making an out and out request for a change in the management. At the request of plaintiff's counsel, Mr. Barghoorn produced the letter in question which bore date of 16th December, 1920. The witness further testified that no examination of the Central Bank was made after the examination in June, 1920; that it was the going out from under of [49] values which induced the Banking Department to make its request for a change more insistent; that Mr. Barghoorn was only occasionally in the bank and the man directly on the job was Ellis; that Barghoorn was a member of the Board of Directors of the Spokane & Eastern Trust Company; that from witness' conversation with Barghoorn on the evening of the 25th his attitude was more that of fearing a collapse of the credit of the bank and an apprehension over

(Testimony of Fred Stevens.)

being able to provide cash for the situation, rather than a fear of the intrinsic worth of his assets; that after the witness came to Yakima on the 26th he became convinced that with a certain amount of outside assistance, the bank could ride out its difficulties; that as to how much outside assistance was necessary, he relied upon the judgment of the credit men of the associated Yakima banks, and the more they looked at the paper the higher became their estimate, and the estimate arrived at was that it would take more than $100,000 to restore the solvent condition of their assets, while the capital stock of the bank was only $50,000. Mr. Rutter is a member of the state Guaranty Fund Board; he was on the Board in 1920 and has been continuously since.

There was put in evidence the telephone bill for long distance telephone calls rendered to the Spokane & Eastern Trust Company from 20th December, 1920, to 27th January, 1921; the bill showed 128 calls during that period. Among these was one call from Triplett to Buckholtz at Yakima on 6th January; one from Buckholtz at Yakima to Hubbard of the Spokane & Eastern Trust Company on 14th January; one from Hubbard to Buckholtz at Yakima on 15th January; one from Triplett to the Trust Company at Yakima on 19th January; and one from Triplett to Buckholtz at Yakima on 27th January. [50]

Testimony of Fred S. Ross, for Plaintiff.

FRED S. ROSS testified that *in* lived in Yakima and was nominal vice-president of the Central Bank; that his business is real estate, insurance and loans, which takes him over five counties, and that Mr. Barghoorn named him as vice-president, for which he received the honor but no recompense and no work; that he was a member of the Board of Directors of the Central Bank; that he was not sure of the other members of the Board of Directors when the bank closed, but that he knew Mr. Ellis, Mr. Barghoorn, Mr. Combe and Mr. Woodcock were; that he knew there were meetings of the representatives of the various banks in Yakima on the 26th and 27th of January; that on the morning of the 26th the meeting of the Clearing-house Association was called; that about 9:00 o'clock on the evening of the 25th he called up Mr. Steinweg and asked him to come down to the bank because he wanted to introduce Mr. Buckholtz to him and talk the thing over; that Mr. Buckholtz had been in Yakima then for three weeks; that when he called Mr. Steinweg he didn't go into details of what was to be discussed; simply told Steinweg that he had also told Mr. Heath, Mr. Fechter and Mr. Jones, and that they wished to have a meeting called of the bankers in town to meet with Mr. Barghoorn to discuss certain matters in regard to the Central Bank. The witness said he was asked to take this action by Mr. Rutter, who called him up and said that Barghoorn was

(Testimony of Fred S. Ross.)

with him and had asked Rutter to get Ross to get hold of Buckholtz and put him in touch with the gentlemen in Yakima so there might be a meeting on the next morning and discuss matters relative to the bank; he didn't say what matters relative to the bank. The witness said he was not cognizant of the daily grind and Mr. Rutter would not discuss such matters over the telephone. The witness said that he received this message just before dinner and called Steinweg not long after. Mr. Rutter said that he had heard pernicious stories had been started in Yakima about the bank by men who should know better and that the Yakima banks should put up an organized front to protect a sister institution. He didn't say anything more except to tell witness to get into communication with Buckholtz. He didn't tell witness there was a large draft outstanding against the Spokane & Eastern which [51] it was not going to honor. He didn't tell witness that Buckholtz knew all the details and could inform witness what the trouble was. He said that Buckholtz had the run of the business and could talk to the gentlemen better than witness could. Witness got Buckholtz probably earlier than 9:00 o'clock and took him down to Mr. Steinweg. Witness told Mr. Steinweg in a general way that it was necessary to have these local men get together and discuss the matter with Mr. Barghoorn the next morning. Mr. Rutter said in his telephone conversation that Barghoorn would be in Yakima the next

(Testimony of Fred S. Ross.)

morning. Witness telephoned Steinweg at 9:00 o'clock to come down town to see Barghoorn and have the Yakima banks get together the next morning to consult about the affairs of the Central Bank because Mr. Rutter told witness he had heard rumors; that was the general gist of the conversation. Mr. Rutter said something had to be done by the local men to keep the bank from having some trouble; that is all he told witness; he would not talk about stuff of that sort over the telephone. Witness testified that he is in the life insurance business, agent for the Western Union Life. Mr. Rutter is president of that company.

Testimony of Claude B. Hay, for Plaintiff.

CLAUDE B. HAY testified that he was formerly bank examiner of the State of Washington, ceasing to be such in March, 1921, and was such examiner during the month of January, 1921; that as such examiner he was *ex officio* a member of the State Guaranty Board, the other members of that Board being Governor Hart. Mr. Rutter, Mr. Stacy and Mr. John P. Duke, who is the present supervisor of banking; that there was a meeting of the full board in the Governor's office at Olympia on 22d January, 1921. The witness then testified: "Two or three days before the meeting of the State Guaranty Board, I had occasion to go to the Governor's office in regard to some business, and I had received a letter from a representative of Bradstreet. In talking with the Governor, he

(Testimony of Claude B. Hay.)

happened to see the letter from Bradstreets in my hand and asked me what it was. The letter asked whether [52] it was true that the Central Bank of Yakima had suspended payment. The Governor got very much excited and told me I could not ignore a letter of that sort and to send a man over at once, and I told him I had [53] assigned the examination of that bank to one of my examiners and he would be there in a few days.

At the meeting of the Guaranty Fund Board later something came up which caused the Governor to ask me whether I had sent an examiner to the Central Bank in Yakima, and I had told him I had not, and he said, "Why haven't you; I told you to." The Governor was very much excited and told me to send a man over there and close that bank at once, and if I would not do it he would find a bank examiner who would. Mr. Rutter told the Governor, I can't recall his exact words, but it is to the effect that the Governor ought not to act hastily in a matter of that kind; and possibly he said I was handling it all right, although I don't know whether he said that, but he said "We have a man over there who is looking after things and things are coming along very nicely," or something to that effect.

Testimony of J. H. Miner, for Plaintiff.

J. H. MINER testified that he was in Yakima on 27th January last, the date on which the Central Bank was closed; that he met Mr. Buchholtz at

(Testimony of J. H. Miner.)

that time and had a conversation with him in reference to the remittance letter sent by the Seattle National Bank to the Central Bank, enclosing, among other items for collection, the check of the United States Steel Products Company for some $47,000.

The witness testified further: I saw Mr. Buckholtz in the lobby of the hotel about 8:45 in the morning, accompanied by Mr. Stevens, Mr. McBride, Mr. Hupp and Mr. Nossaman. The group of us walked down the street to the office of the Yakima National Bank. I had never seen Mr. Buckholtz before and I had difficulty in getting his name, and I finally asked him how to spell it, and he gave me his card. The card was introduced in evidence. It reads: "W. F. Buckholtz, Spokane, Washington. Credit Department, Spokane & Eastern Trust Company." I immediately identified him as being a representative of the Spokane & Eastern Trust Company, and following the breaking up of the conference, Mr. Buckholtz and I and several others went down to the office of the Central Bank, and on the way I questioned him concerning the transaction. I was particularly interested in this remittance letter and the draft in connection with the Spokane & Eastern's refusal of it. After we arrived at the bank we looked up the remittance [54] letter and discussed the point as to whether the remittances were made promptly, and the records show there had been no delay on the part of the Central Bank in effecting collection and making remittance.

(Testimony of J. H. Miner.)

Mr. Buckholtz told me that he had been in touch with the handling of this item himself; that he knew this was the Yakima Hardware Company's check, the large item, and he knew the draft had been issued in favor of the Seattle National Bank in payment of the cash collection letter, and that he knew funds had been sent to cover this outstanding draft. In fact, I questioned him. I was very much interested in the details because of our interest in the matter. He informed me this was exchange he had received from the Yakima Valley Bank, which was enclosed in their remittance letter to Spokane. I walked back to the Commercial Hotel and during the course of the conversation it appeared we were doing a somewhat similar work. I was outside man for the Seattle National Bank and he led me to believe that he was the outside man for the Spokane & Eastern. I asked him if he was in touch with the Spokane & Eastern by long distance 'phone and he admitted that he had talked with them on numerous occasions; that it was his custom to talk frequently with them concerning the transactions that were involved between the two banks. I asked him whether he had discussed this matter of this cash remittance letter and this draft and he said that he had discussed that matter with them over the long distance 'phone. I asked him particularly if he didn't know that these items were collection items and that the Central Bank at no time had title to these items, and he admitted he was so informed. I remember asking him whether they

(Testimony of J. H. Miner.)

didn't know that this draft was outstanding previous to the date it was actually presented, and he told me that they did know the draft was outstanding. I saw Mr. Buckholtz off and on through that entire day, saw him in the evening, and it was quite natural that this topic of conversation should come up, and the opportunity was given me to further confirm the information I received earlier in the day by a series of questions from perhaps a little different angle, so that there was no doubt in my mind as to what information he had and the information he had imparted to me. I came over here to find out what I could about [55] that remittance and what had happened; that was the occasion of my trip. I brought the point out by a question to Buckholtz if he had informed the Spokane & Eastern Trust Company that the remittance that was made to it on the 21st by the Central Bank were the proceeds of those same collection items. He said he had communicated that information to them by long distance telephone. I discussed that with Mr. Buckholtz, the condition of the Central Bank, and his statement to me was that he didn't think it would pay more than 30%. I had a conversation with Mr. Barghoorn on that day. Mr. Barghoorn was very much upset and talked very freely to me. He outlined that he had bought the bank in conference with Mr. Rutter of the Spokane & Eastern in whom he had at that time the utmost confidence, and when they encountered these difficulties in the fall arrangements were made with the Spokane & Eastern to supply them with funds

(Testimony of J. H. Miner.)

through rediscounts and direct loans, and that through Mr. Rutter he had secured Buckholtz to come down there to look after the interests of the Spokane & Eastern in connection with their rediscounts. He outlined to me the gist of the conference he had with Mr. Rutter ten days previous to the 25th in which he had signed over personal assets which he estimated to be worth $75,000 to further secure the Spokane & Eastern in connection with rediscounts and bills payable, and he seemed to be quite concerned on this date, the night of the 27th, at this early date, ten days previous to the crisis, that it was all up to the Spokane & Eastern to see him through this immediate difficulty, and he said he was very much surprised ten days later to be notified he would have to raise at least $35,000 to protect outstanding drafts which had been issued in Seattle, and that as he had no other resources in Spokane, having pledged over the cream of his assets ten days previously, he immediately made arrangements to come to Yakima and see what could be done; then he showed me a copy of the telegram which he had sent from Pasco to Mr. Witherspoon asking Mr. Witherspoon to notify the Seattle National Bank, and he wanted me to feel that he had played fair in letting us know just as soon as he knew there was a crisis impending. [56]

On cross-examination the witness testified that he was in continuous contact with Mr. Buckholtz for several hours on the 27th; that during those hours

(Testimony of J. H. Miner.)

he ceased not to cross-examine him; that the result of that examination was that Buckholtz said that he knew when the cash letter came in and he knew when the draft in payment of it was sent out. Testifying further the witness said: He didn't tell me that he immediately called up the Spokane & Eastern by long distance; he told me he called them up on the date the cash letter was there. He didn't tell me that on the same day that the cash letter was there he called up the Spokane & Eastern and told them about it. There was no specific telephone call mentioned when he made reference to this cash letter. He simply said they were informed of the matter. He told me they were informed by means of long distance telephone call about the draft, but the date wasn't specified. I inferred from the conversation that it was on the date the cash letter came over. As to the draft that was drawn against the Spokane & Eastern, I inferred that he called them up to tell them on the date the draft was issued, but I am not saying for a moment that he specifically admitted he called them up about the draft. I don't think the point was definitely fixed that he called them up on the same date the draft was issued. I never did find out when he called them up to tell them about the draft, only that he had informed them by long distance about it. We didn't discuss correspondence at all. I didn't ask him about letters but I did ask him about long distance. I said he informed them about this transaction; they might have called him up. He said he

(Testimony of J. H. Miner.)

talked with Mr. Triplett about this draft by long distance. I didn't ask him what Mr. Triplett said. I had no curiosity on the subject of what Mr. Triplett said or how he took it; I merely wanted to know whether he had informed them. The scope of my employment was to get the information I thought was of value and he never told me what they said. I went back to the question indirectly by a series of different questions, and he said that he was fully informed and he [57] had informed them. Probably this wasn't all covered in one conversation. We were walking along the street and other fellows with us, and the crowd would separate us, but as soon as I got a chance I would commence to cross-examine him again, and every time I questioned him it came back to the result that he knew all about it and had informed them about it over long distance; probably I didn't repeat that conversation more than three or four times. Mr. Nossaman overhead some of it. He is a lawyer from Seattle who was accompanying me. He is now in Yakima. I didn't ask Buckholtz whether he had written the Spokane & Eastern about it; I had the information I desired in the admission it was over the long distance telephone; I diden't care to go into it any further; I didn't want to arouse his suspicions unduly by digging into it any more than was necessary.

Testimony of William L. Steinweg, for Plaintiff (Recalled).

WILLIAM L. STEINWEG testified that he was president of the First National Bank of Yakima and remembered the occasion of the representatives of the various Yakima banks meeting to consider the affairs of the Central Bank the day before it closed; that on the night of 25th January, Fred S. Ross called him up at his house and asked him to come down to the bank as he had an important business matter he wanted to talk over; that about 9:00 o'clock he met Mr. Ross, who was alone to the best of his recollection; that Mr. Ross stated that he had just received a message from Mr. Rutter of the Spokane & Eastern saying that unless the clearing-house banks of Yakima came to the rescue of the Central Bank before 10:00 o'clock the next morning, the bank would be closed by the examiners, who were on their way from Spokane for that purpose. The presidents of the different banks were called together the next morning to consider the situation. The first meeting was held in the directors' room of the Yakima National Bank. A later meeting of the clearing-house was held that night. Mr. Louden, our cashier, and myself were present, representatives of our bank at that meeting. [58]

Testimony of James A. Louden, for Plaintiff (Recalled).

JAMES A. LOUDEN testified that he was cashier of the First National Bank of Yakima and

(Testimony of James A. Louden.)

remembered the meeting of the representatives of the various Yakima banks immediately prior to the closing of the Central Bank; that he attended the night session on the 26th; that he was not present at the one called at 9:00 o'clock on the 27th. The night session began about 8:00 o'clock in the evening and continued until about 4:00 o'clock the next morning; that representatives from all the Yakima banks were present, together with the state examiners. Mr. Barghoorn, Mr. Buckholtz and Mr. Ellis. The time was principally taken up with discussing the securities of the Central Bank. There had been previous meetings when the notes had been examined by representatives of the banks. This examination was with the idea of arriving, if possible, at the amount necessary to help the bank out. There was no definite conclusion arrived at from the examination of the securities, but each of us had made a list as the securities were called, and we ourselves had made up our minds that nothing could be done within reason to help out the bank. The representatives from our bank were of the opinion that $100,000 would not aid the bank any.

On cross-examination the witness testified as follows: that in the discussion between the members of the local banks there was never any amount mentioned that we would put up, but the examiners asked if they could get help from outside towns such as Spokane and Seattle, whether we would do our share, and we were trying to arrive at what that

(Testimony of James A. Louden.)

share would be. It was $100,000 that they were trying to raise; whether that was the total or the local contribution witness couldn't say; in witness' opinion $100,000 would not save the bank; witness did not express that opinion and didn't think the other banks did; that was simply the opinion of our bank. During the evening the amount was discussed as high as $125,000, but we did not reach anything definite that night. The only report witness had from the bank examiners was that the Spokane & Eastern would contribute $15,000. At the meeting [59] of the bankers no conclusion was ever reached as to the amount we would put up.

Testimony of William N. Irish, for Plaintiff.

WILLIAM N. IRISH testified that he was vice-president of the Yakima Trust Company and attended some of the meetings respecting the Central Bank business on the 26th; that he took part in examining the securities and assets; that no definite opinion was expressed as to any action that should be taken; that his own opinion was that there was such a large amount of poor paper that he could not see where the banks could get back of it to save it. Witness also testified: As I recall it the banks would have to contribute somewhere between $50,000 and $100,000. Different opinions were expressed as to the amount that would be needed. We found what we considered to be $100,000 worth of paper that was of no particular value and other amounts, I don't remember the amount of it, that was of

(Testimony of William N. Irish.)

doubtful value. As far as I could learn, it seemed to be the concensus of opinion of all present that there was at least $100,000 of the paper that was of no value.

Testimony of James A. Louden, for Plaintiff.

JAMES A. LOUDEN testified that he met Mr. Buckholtz shortly before the failure of the Central Bank; that Buckholtz introduced himself as a representative of the Spokane & Eastern Trust Company.

On cross-examination the witness testified that Buckholtz introduced himself as a representative of the Spokane & Eastern by a card; said he was Mr. Buckholtz of the Spokane & Eastern Trust Company. He told witness he was looking after some of the affairs of the Spokane & Eastern; that he had just finished a job in the northern part of the state similar to this and was looking after the affairs of the Spokane & Eastern in connection with the Central Bank; that was in the way of introduction. He said he was going to be here some little time. The reason it possibly impressed witness was it was an indication of the fact that there was something wrong across the track, by which witness meant with the Central Bank. What he said was just by way of introduction, that he was looking after the affairs of the Spokane & Eastern. There was no business up between witness and him that required him to state with accuracy anything

(Testimony of George M. Lemon.)
about his position; it was just by way of introduction. [60]

Testimony of George M. Lemon, for Plaintiff (Recalled).

GEORGE M. LEMON produced the daily statements of the Central Bank and its draft register showing transactions such as the cash letter that is involved here. He testified that the only entry that was made of a remittance draft was the actual notation of the draft being drawn in payment of a letter; it was held as a cash transaction, and that he had the book containing those transactions and also the daily statements of the bank through the month of January and for some time preceding. He testified that just before he drew the draft in payment of the cash letter of the Seattle National Bank that came in about the 20th or 21st of January, Mr. Buchholtz and he were talking about the letter and he was showing Buchholtz the draft drawn against the Spokane & Eastern Trust Company account. Witness thought the large item of $47,000 came up in their conversation. He wanted to know what made such a large draft and witness told him about this large draft drawn on the Yakima Trust Company by the Yakima Hardware Co. in the amount of $47,000.00.

On cross-examination the witness testified that this was after the collection had been made and the credit taken at the Valley Bank, but that the re-

(Testimony of George M. Lemon.)

mittance had not yet been made to the Spokane & Eastern.

On redirect examination he testified that the remittance was mailed out and the draft drawn on the same day, and the conversation took place just before he wrote up the draft in payment of the letter. The witness testified also that so far as he knew, while Mr. Buchholtz was at the bank he had to do with the renewing of notes, securing of collateral, financial statements, and had to do with the note pouch in general; that as far as he knew, Buchholtz handled the rediscounts from approximately the 5th of January on; that the notes were rediscounted with the Spokane & Eastern. He didn't know whether any notes were rediscounted elsewhere; that he would have to refer to the books to see whether there were rediscounts elsewhere; that the Central Bank had some other rediscounts at that time; that it had rediscounts with the National City Bank of Seattle; that he had seen [61] Mr. Buchholtz looking at the daily statements,but whether he did every day he could not say; that there were cash remittances made to the Spokane & Eastern during the month of January, but no letters of this size; this was the largest. [62]

In connection with the charge-backs of the 25th of January, the witness explained that those tags were made up in this manner: Our custom was to wait until the next morning to enter them on our general ledger in order to get all the items for that day in that day's business. We used to post

(Testimony of George M. Lemon.)

the ledger along about 9:00 o'clock in the morning as a convenient time, and sometimes before 9:00 o'clock Buckholtz called me up and told me there were some additional items on his desk which to be sure to get through on the ledger on the day of the 25th. This was on the morning of the 26th that he called me. The items he furnished me were made out in his own writing. Some of the credits were still in Spokane or in transit. In cases of fruit drafts it was the practice when a charge-back like that was made when paper was out of the bank, to receive advice either by wire or letter in order to furnish the basis of an entry. In case of rediscounts, I believe the general practice was to send the rediscount paper down a few days before it was due so that a renewal could be made or the bank could arrange to take care of it. Some of the items referred to on the 25th consisted of fruit drafts that were out of our possession. I don't know where Mr. Buchholtz got his instructions to make up these tags.

On cross-examination, the witness said that he didn't know what Mr. Buckholtz' conversation or instructions were; that Mr. Buckholtz called his attention to the rediscounts and drafts charged back by telephone.

On redirect examination the witness testified that the deposits of the Central Bank in November, 1920, amounted to $665,753; on 3d January to $513,080; that the decrease in deposits from the 3d

(Testimony of George M. Lemon.)

to 4th was $16,000; between the 4th and 5th, $15,-000; between the 5th and 6th, $7100; between the 6th and 7th, $7000; while from the 8th to the 9th they increased $9,000; on the 11th, they decreased, $3800; on the 12th the deposits had decreased $3300; on the 13th, decreased $16,100; 14th, $7900; 15th, $5500; while on the 17th the deposit increased $12,900. This increase was due to a rise in individual deposits in checking accounts. The 18th, the deposit decreased $9600; 19th, $2300; 20th, $5400; 21st, $6000; 22d, $11,500; 24th, $1700; 25th, $8300; that on [63] January 3d the deposits were $513,080; on January 21st, the deposits were $430,094; and on the 25th the deposits were $426,-151. There was introduced in evidence a table showing the increase and decrease of loans beginning with January 3, 1921. The tables showed a decrease in loans on January 3d of $1472.13; on the 4th, of $2071.90; on the 5th of $1470; on the 6th of $365.06; on the 7th of $12,940.67; on the 8th of $12,107.75; on the 10th an increase of $5,-190; on the 11th of $21,950; on the 12th of $10,375; on the 13th of $358.69; on the 14th a decrease of $4010; on the 15th of $38.34; on the 7th a decrease of $5236.50; on the 18th a decrease of $2005; on the 19th of $591.69; on the 20th of $1,661.39; on the 21st of $412.10; on the 22d of $470; on the 24th of $1134.40; on the 25th, $21,868.47; on the 26th of $1013.16. The witness explained that the item of January 8th, $12,000, was really a switch in the loans and discounts; that there was an item of $11,-

(Testimony of George M. Lemon.)

000, Frank Investment Company note, that was presumably sold a day or two before to the Spokane & Eastern; that this item was not collected and was returned to the Central Bank and shows on the 12th as loans increased; on the 25th, a statement of a collection of $21,000 is explained by a $20,000 note of Mr. Barghoorns that was paid by the sale of Liberty Bonds which had been given as collateral security for it. There was introduced in evidence a table showing the rediscounts of the Central Bank with the Spokane & Eastern beginning on January 3, 1921. On January 3d, the item (in round figures) was $114,000; on the 4th, $119,000; on the 5th, $119,000; on the 6th, $116,000; on the 7th, $116,000; on the 8th, $163,000; on the 10th $163,000; on the 11th, $184,000; on the 12th, $186,000; on the 13th, $186,000; on the 14th, $183,000; on the 15th, $181,000; on the 17th, $183,000; on the 18th, $182,000; on the 19th, $182,000; on the 20th, $188,000; on the 21st, $192,000; on the 22d $192,000; on the 24th, $192,000; on the 25th, $142,000; on the 26th, $147,000; on the 27th, $147,000. The witness testified that beside the Spokane & Eastern the Central Bank had rediscounts with the National Bank of Seattle; that there was no appreciable change in those rediscounts during the month of January, 1921, a net change of about $600 being all; that the compilation of rediscounts does not include notes that were pledged as collateral with the Spokane & Eastern. The witness further testified that on January 3d [64] the cash re-

(Testimony of George M. Lemon.)

serve of the Central Bank was 10%; on the 4th, 9%; on the 5th, 6%; on the 6th, 4%; on the 7th, 3%; and that the next day it jumped up and went as high as 19% by the 11th; on the 8th, it was 15%; on the 10th, 16%; on the 11th, 19%; on the 12th, 17%; on the 13th, 14%; on the 14th, 13%; on the 15th, 11%; on the 17th, 13%; on the 18th, 11%; on the 19th, 11%; on the 20th, 12%; on the 21st, 11%; on the 22d, 11%; on the 24th, 11%; on the 25th, 4%; on the 26th, 3%; on on the 27th, 8%. The witness testified that the Sundry Banks account consisted of items sent to various banks or individuals for collection, a great part of it consisting of fruit drafts that had not been collected or honored; they proved to be not such cash items as could be drawn against for cash; they were fruit drafts sent to banks for collection which it was supposed would be paid. This item on the 3d amounted to a third of the Central Bank's total cash. These items were included in the amount of reserve testified to; on the 3d the items would amount to about one-third of the total cash; about one-fourth on the next day; about two-thirds on the next day; and on the 6th they equalled a little more than the bank's total cash, the reason for that being that the overdraft of the Spokane & Eastern was deducted from the cash reserve. The witness then proceeded to state the proportion that these items bore to the total cash for the iarious days during the month of January, running from a 6th to a 3d thereof. The

(Testimony of George M. Lemon.)

witness' attention was called to a list, showing a balance, according to the books of the Central Bank, of the Spokane & Eastern account, showing the balances on any given date from 3d January to 27th January, red ink showing the amount of overdraft and the black showing the balance to the credit. A table showing such daily balances was introduced in evidence and showed as follows: 3d January, overdraft (speaking all through in round figures), $22,000; 4th, $28,000; 5th, $38,000; 6th, $51,000; 7th, $54,000, 8th, $3,000; 10th, $700; 11th a balance in favor of the Central Bank of $21,000; 12th, a balance in favor of Central Bank, $8,000; 13th, a balance in favor of Central Bank, $290; 14th, overdraft, $13,000; 15th, overdraft, $10,000; 17th, overdraft, $12,000; 18th overdraft, $14,000; 19th, overdraft, $22,000; 20th, overdraft, $17,000; 21st, overdraft, $16,000; 22d, overdraft, $13,000; 24th, overdraft, $17,000; 25th, overdraft, $56,000; 26th, overdraft, $51,000; 27th, overdraft, $51,000. The witness then testified that just before the [65] remittance was made to the Seattle National Bank before the draft was drawn, Buchholtz and he were talking over the items, and Buchholtz said, "We will send these drafts to Spokane; it will make our balance look well up there for a few days until this overdraft gets in." The two drafts he referred to were the drafts for $48,000 purchased at the Yakima Valley Bank, and the overdraft was the $51,000 draft sent to the Seattle National in payment of its letter. There was then

(Testimony of George M. Lemon.)

introduced in evidence daily bank statements from January 3d to the 27th. These bank statements are not inserted, as they are of no materiality save as going to the question of the insolvency of the Central Bank. The defendant Spokane & Eastern Trust Company makes no question but that the Central Bank was in fact insolvent during the month of January, 1921; that is, it could not have met its obligations without outside assistance. This concession for the defendant, however, is not the concession that the officers of the Central Bank or any of the officers of the Trust Company knew that it was insolvent at any time prior to that date its doors were closed.

The Court stated that it would take judicial knowledge of the fact that the time required for the transmission of mail between Seattle and Yakima was five or six hours, and between Yakima and Spokane little longer. [66]

On recross-examination the witness testified that the conversation with Buckholtz just referred to occurred about 5:00 o'clock on the afternoon of the 21st; that he then stated to Buckholtz that the Central Bank would have to draw a $51,000 draft to cover the collections items from the Seattle National Bank; and Buckholtz said that we would send those big drafts up to Spokane & Eastern in our remittance; that it would boost our balance there for a few days while the draft we drew against them in favor of the Seattle National Bank was floating. He said to write the draft, to draw

(Testimony of George M. Lemon.)

it on Spokane, and our custom was for him to take the drafts and look them over and see that they were mailed. Along in January, the amount of our rediscounts with the National City Bank of Seattle was approximately $31,000. It remained fairly steady. In addition to the rediscounts, we had bills payable with them for $30,000; that remained fairly steady. Our active account both for rediscounts and bills payable and other drafts was with the Spokane & Eastern and not with the National City. Our books did not necessarily show from day to day the rediscounts that had been charged back to us. It might be the next day before we would receive their advice on the charge-backs so that our books would not balance on the same day with the Spokane & Eastern. The statement of balances shows an overdraft on the 25th of $56,000, which goes down to $51,000 on the next two days; that does not include the rejection of the draft drawn against the Spokane & Eastern in favor of the Seattle Bank. The balance was stated upon the theory that the draft had been paid.

Witness further testified: I didn't know until the 26th that it had been rejected; that was not carried into our account because the examiners were there and they didn't see fit to charge it off; that is the reason the overdraft appears as it does upon the statement. On the 27th, if the draft had been charged back to us, or carried into our books so as to show its rejection, it would practically balance the account. We have no statement of bills

(Testimony of George M. Lemon.)

payable to the Spokane & Eastern. We had bills payable there of $20,000 from January 3d to the 27th; that account was steady, and the only fluctuation was in the rediscounts and overdrafts. On rediscounts, we from time to time substituted, that is to say, a note that had been rediscounted would be taken up by us and another put in its place. [67] These changes in balance take that into account and show the net after that had been done. Before this conversation with Buckholtz, I had not been directed to forward the Yakima Valley Bank drafts to the Spokane and Eastern for deposit and to draw in favor of the Seattle National on the Spokane & Eastern. I hadn't made up my mind whether I would do that. I had not talked with Mr. Ellis about it; I had intended to; I wasn't absolutely sure that was the course he would take; I didn't apply to Mr. Buckholtz for instructions and I was not intending to apply to him for instructions. I was going to take it up with Mr. Ellis. As I went to the register where we kept it, Mr. Buckholtz happened to meet me there. I was going over the items and that was the way it came up. Probably in a bulk of the instances we had been forwarding all our deposits to the Spokane & Eastern and drawing against them. If the ordinary course of business had been followed, these Yakima Valley Bank drafts would have been sent along with our other remittances for credit with the Spokane & Eastern, and the draft in favor of the Seattle National would have been

(Testimony of George M. Lemon.)

drawn against the Spokane & Eastern. The Yakima Valley Bank drafts were made payable to the Central Bank & Trust Company and endorsed by our general endorsement "pay to any bank or banker."

On redirect examination the witness testified that this remittance appeared to be the largest item sent to the Spokane & Eastern during that period; that the $45,000 draft was not sent directly to Seattle because although the Central Bank had an account there it was not really an active drawing account; that it was not its custom to send drafts and deposits there and draw against them; that it would have been perfectly proper to send the $45,000 proceeds direct to the Seattle National providing they had a balance large enough to take care of the difference between the deposit and the amount of the draft. The witness further testified that the amount charged back by the Spokane & Eastern on 25th January was around $24,000; that the entries on the books dated the 25th were made between 8:00 and 9:00 o'clock on the morning of the 26th; that some of the tickets were Mr. Buckholtz', but some were regular items; that they were quite a sizable bunch of tickets Mr. Buckholtz made out; [68] that the amount of the $51,000 draft was credited on the Spokane & Eastern account as having been drawn against them and so went into the amount of the overdraft shown on the 21st; that the Spokane & Eastern was credited with anything drawn against them at

(Testimony of George M. Lemon.)

the time we drew it and charged with the remittance; that in addition to the Barghoorn note, the Central Bank had bills payable with the Spokane & Eastern amounting to $20,000, which was regular bank paper executed by officers of the bank and which was secured by bank loans and discounts as collateral; that the amount of this collateral was $30,000, while the loan was $20,000.

On recross-examination the witness testified that the paper shown him was a day by day list of the cash letters sent by the Central Bank & Trust Company to the Spokane & Eastern for credit during the months of October, November and December, 1920, and January, 1921; that it did not include any notes or rediscounts sent, but merely cash items, drafts, checks, etc.; that it showed merely cash items which were sent by the Central Bank to the Spokane & Eastern for credit during the period stated. The paper was introduced in evidence. This statement showed cash remittances; that is, checks, drafts and other regular cash items for every banking day of the month of October, running (speaking in round figures) in amounts from $6,000 to $34,000 for each day, and totaling for the month $421,000. It showed for November similar remittances for practically every banking day running in amount for each day from $3,000 to $26,000, totaling for the month $317,000. It showed for December cash remittances for every banking day of the month running in amount from $1,000 to $15,000, totaling $156,000 for the

(Testimony of George M. Lemon.)

month. It showed for January remittances for every banking day from January 3d to the 26th, running in amount from $700 to $48,000, a total of $151,000 for the month, or a grand total for the four months of over $1,000,000. [69]

Testimony of J. H. Miner, for Plaintiff (Recalled).

J. H. MINER testified on direct examination that when the Seattle National Bank was advised that payment of the draft for $51,000 had been refused it charged back to plaintiff the item of $47,000, the check which had been given it for collection. On cross-examination he testified that the bank had also charged back to the other customers the other items contained in the letter, which was in accordance with the bank's usual custom and nothing special about it. [70]

Testimony of Edward Bray, for Plaintiff (Recalled).

EDWARD BRAY testified that plaintiff had never received any return in money or anything of value on account of the $47,000 check.

Testimony of B. J. Ellis, for Plaintiff.

B. J. ELLIS testified that he was the cashier of the Central Bank & Trust Company and became such officer in February, 1920; that the only examination of the bank made after he became cashier was the one testified to by Mr. Stevens in June of 1920; that there was dissatisfaction with the wit-

(Testimony of B. J. Ellis.)

ness' conduct of the bank, but that it was physically impossible to be informed in the short period of time he had been connected with the bank as he should be and would like to be; that the paper had come to the bank prior to his time; that Buchholtz came to the bank on the morning of the 6th January; that the occasion for his coming was that on the beginning of the new year, on 3d January, there were abnormal conditions in the bank; very heavy withdrawals, and he communicated with Mr. Barghoorn and Barghoorn came down with Buchholtz on the night of the 5th of January. There had been something of a run on the bank during the first two or three days of January. Minutes of the meeting of the board of directors of the Central Bank & Trust Company held on 11th January were introduced to show that no action was taken at the meeting relative to employing Mr. Buchholtz and that none of record was afterwards taken. Continuing, the witness testified that Mr. Buchholtz was in the Central Bank; he was handling the rediscounts for the Spokane & Eastern, selecting such paper as was sent to them; that the Central Bank was sending up paper for rediscount to the Spokane & Eastern during that period; that owing to the heavy withdrawals it was necessary to have considerable financial support, and Mr. Buchholtz was handling that entirely. The Spokane & Eastern was, in popular parlance, carrying the Central Bank and did until the closing; that the Spokane & Eastern was the principal correspondent at all times

(Testimony of B. J. Ellis.)

and the bank was mainly leaning on the Spokane & Eastern for financial support; that when it became necessary for some paper to be rediscounted with the Spokane & Eastern, Mr. Buchholtz selected the paper; that he had unrestricted access to all the securities and he and the witness would go through them daily, selecting the best and the history sheets and classifying. The history sheet [71] is a financial opinion or estimate in the absence of a financial statement, or it would include additional information not included in the financial statement. Mr. Buckholtz during his time determined what paper would be sent up. The witness handled none of the rediscounts after he came in.

The witness testified further: As to the extent of Buckholtz' responsibilities, he and I together checked regularly, daily, all the financial transactions and consulted together pertaining to them. The man referred to as "Van" in the correspondence was Van Vleck, assistant cashier until 1st January, 1921. The testimony of Mr. Stevens respecting defects in records of profit and loss referred to the activity of the profit and loss account; that was prior to my time. There was some criticism of my management of the bank following the examination of June. The first time I had knowledge about the letter to Mr. Barghoorn was yesterday. Possibly due to misinformation or lack of understanding, the Spokane & Eastern, and possibly one of the members of the State Banking Department, had censured me and held me responsible for conditions

(Testimony of B. J. Ellis.)

which I did not create and had no control over. As I recall it, during the period I was in there the maximum loans of the bank were about $650,000; that was the peak they reached during that period; the loans were about $508,000 when I went in; they were $552,000, about, when I quit. Among the increase of loans was one of $11,000 to the Frank Investment Company and one of $5,000 to Ross & Fisher, of which Mr. Ross, the vice-president, is a member, and $12,000 to another director, Mr. Woodcock. The witness further testified that he remembered when the cash letter came in from the Seattle National Bank containing a check for $47,000 in favor of the plaintiff; that the letter either arrived at the bank on the afternoon of the 20th or the morning of the 21st; that he talked with Mr. Buckholtz in regard to the cash letter; that it was discussed as usual. Buckholtz and the witness consulted concerning both incoming and outgoing cash items and clearings, and the particular letter was discussed in the usual manner and probably a little more at length, owing to its unusual size; that Buckholtz saw it and the items; that the drafts which were received through the clearings were sent to the Spokane & Eastern because it was the principal and drawing correspondent, and the only time the Central Bank didn't use them in the ordinary course of business was when the remittance was in the extreme east or in [72] California; that in the particular instance Buchholtz and the witness discussed the matter at some length and decided to

(Testimony of B. J. Ellis.)

send it to Spokane. The reason therefor the witness could not state specifically other than that they thought it was regular and drawing on them in settlement of the Seattle letter would avoid, as Buchholtz said, a transfer from some other account to the Seattle National, and would apparently swell the balance at Spokane for a few days.

On cross-examination the witness testified that Mr. Buchholtz didn't have charge of the whole of the credit department; that Mr. Buchholtz and he and the loan committee had charge of that; that Buchholtz had charge of it jointly with him; that in the time that witness had been with the bank prior to the examination made in the last part of June, 1920, he did not have time to entirely familiarize himself with the condition of the bank's paper; that that was necessarily so. He further testified that from the 1st of October and before that time, all items of any consequence, unless they went to the far east or to California, were deposited with the Spokane & Eastern; that the instructions were that the Spokane & Eastern was to have practically all of the business, and that all drafts in payment of whatever the bank had to pay were drawn upon them in that territory, except that Frisco was used for California business and that the National City Bank of Seattle was used for some of the western business; and that the National City Bank was quite actively used at times as they handled the Canadian stuff for the Central Bank; that during that period the custom was, in making

(Testimony of B. J. Ellis.)

remittances to the Seattle National, that about one-half of the settlements would be by drafts drawn on the National City Bank, or possibly not a half, and the other would be by drafts on the Spokane & Eastern; that he sent all the Yakima Valley drafts to Spokane for deposit, and drawing a draft in favor of the Seattle National against the Spokane & Eastern was not irregular, and that it was within the ordinary course of business as it had been transacted to draw it either there or on the National City Bank; that it would not have been sent to the Seattle National Bank in any case because the Seattle National was not a [73] drawing correspondent, a nominal balance only being carried there. While it might not have been out of the ordinary to have done it in this instance, it had never been done and in that sense would have been out of the ordinary.

On redirect examination the witness testified: That it was not a question of drawing on the Seattle National Bank. The Central Bank had the funds in transmittable form; that it was the purpose of the Central Bank that the Seattle National Bank should receive them, but instead of doing it directly, they did it indirectly by sending them to Spokane; that after Mr. Buchholtz came, witness carried on no correspondence with the Spokane & Eastern, but Buchholtz did it all; prior to Buchholtz' arrival witness had occasion to write the Spokane & Eastern almost daily in the regular course of business, but that he wrote no letters after Mr. Buchholtz came.

Testimony of W. L. Nossaman, for Plaintiff.

W. L. NOSSAMAN testified that he was in Yakima on the 27th January with Mr. Miner for the purpose of reporting on conditions to Mr. Spangler, president of the Seattle National Bank; that he asked Mr. Buchholtz for an estimate as to what the Central Bank would pay, and Buchholtz said he didn't think it would exceed thirty cents on the dollar. Witness also remarked something to Mr. Buchholtz that it seemed to him that the Spokane & Eastern would not have appropriated the money if it knew of the outstanding draft of $51,000, and Buchholtz said they did know of it; he didn't tell witness how they had the information.

Testimony of Harry Coonse, for Plaintiff.

HARRY COONSE testified that he was in charge of the affairs of the Central Bank & Trust Company as liquidator, and in his opinion it would pay between thirty-five and forty cents on the dollar. [74]

DEFENDANTS' EVIDENCE.

There was introduced in evidence a copy of the complaint in an action pending in the Superior Court of the State of Washington for Yakima County brought by the Seattle National Bank against the Spokane & Eastern Trust Company, Central Bank & Trust Company and John P. Duke, as supervisor of Banking. The action was one brought by plaintiff as trustee for various depositors to recover the balance of the items in-

(Testimony of W. T. Triplett.)

cluded in the remittance letter of 19th January, 1921, the complaint being similar in form and theory to the complaint in this action.

Testimony of W. T. Triplett, for Defendants.

W. T. TRIPLETT testified that he was a vice-president of the Spokane & Eastern Trust Company and a member of the board of directors and of the executive committee; that previous to 18th January, 1921, he had been secretary, and had a long experience in various positions in banking houses; that during the period under inquiry here he had charge of the relations with the country banks who kept accounts with the Spokane & Eastern, or had other kinds of dealings with it; that it had been the policy of the Spokane & Eastern Trust Company for a great many years to build up its country bank business by rendering assistance in furnishing employees to the country banks; that country banks often asked the city banks to recommend someone for a position in such banks and that the Spokane & Eastern at times recommended its own employees for such positions if they were good men, thinking that they would become, in time, officers of the bank and would retain a friendship for the Spokane & Eastern Trust which would build up business between the two banks. The witness then gave twenty-four cases where, upon the request of sundry country banks it had recommended men for employment during a considerable number of years, and stated that in practically every instance it had

(Testimony of W. T. Triplett.)

resulted in cementing the friendly relations between the banks. Five of the cases were recommendations of men then in the employ of the Spokane & Eastern Trust Company. That he has not mentioned a great many who were sent out and proved unsatisfactory. Speaking of the specific instance of the Central Bank and Mr. Buckholtz, the witness testified that Mr. Barghoorn had informed the witness that he was contemplating a change in the Yakima bank and asked witness if he knew [75] of anyone competent to take the place.

The witness continued: Barghoorn stated that he wanted a man who was peculiarly fitted to look after loans and manage a bank in a town the size of Yakima and who was capable of building up a business. Mr. Barghoorn was frequently in the bank, being a member of the board of directors of the Spokane & Eastern at that time, and would ask me if I had got him a man yet. I sent up several who had come in to us from outside banks where business was contracting, but he did not take any of them because we were not in a position to recommend them as he wished them to be recommended. Finally, I had a talk with Mr. Rutter and we decided that if Mr. Barghoorn wanted to negotiate with Mr. Buckholtz that we would let him do so. We did not like the thought of Mr. Buckholtz leaving our employ, but we thought it might be a good thing for him as it looked at that time as if the Central Bank was a nice opportunity for a young man in a growing town like Yakima. I sent Buck-

(Testimony of W. T. Triplett.)

holtz up to Mr. Barghoorn's office, telling him that Barghoorn was looking for a man to go to Yakima and ultimately succeed Mr. Ellis as cashier of the bank and that we had recommended him for the position. Later in the day, Buckholtz said to me that he had decided to take that position and asked when he could get away, and I said "To-night if you want to," and he went away that night. Within my knowledge and my contemplation there was no sort of a string to that employment of Buckholtz nor any sort of understanding, express or implied, that he was to be the agent of the Spokane & Eastern. He left our employment at that time, and in accordance with my usual custom I notified the comptroller's department that he was off the pay-roll. There was some salary coming to him for a few days in January, and he afterwards requested the comptroller to send the balance that was due him to his wife, which was done. Speaking for myself, I have told everything that occurred between myself and Buckholtz respecting this employment. We made no arrangement with Buckholtz to send to him for collection notes which were held as collateral for indebtedness of the Central Bank to us. It was discussed in our Executive Committee and we decided that it was all right for Mr. Buckholtz to have those particular notes. We were aware that Mr. Buckholtz was ultimately to succeed Mr. Ellis as cashier of the bank, and Mr. Ellis, with all due respect, did not handle our rediscount notes in the way we thought he [76]

(Testimony of W. T. Triplett.)

ought to. The statements that he sent to us with the notes showed that many of the borrowers had produce which they could sell by the time the notes came due and pay the notes off, and we would charge their accounts with the notes at maturity and send them down there expecting they would be paid and the rediscount liquidated, but instead of that we found he took renewals of them. Of course they were his notes when they were charged to his account and he could do what he pleased with them, but when he resubmitted them to us with ninety days additional time, we didn't like it. Knowing Mr. Buckholtz' confidential position there with Mr. Barghoorn, we had no hesitancy in sending them to him, but we didn't want Ellis to get hold of them. From that time on, they were sent to him individually; that arrangement had no relation to anything that was done before he went away, but had its origin after he had gone to Yakima. It had its origin solely and exclusively in the conversation and correspondence to which we have referred and was solely for the purpose stated. After the Central Bank closed, Mr. Buckholtz called me up, or I called him up, and he said, "the bank is closed," and I said to him that I supposed he was footloose and he said "yes." I said that I had a job for him; that I wanted him to take possession of all the notes and collateral we had down there and look after our interests in Yakima, and he did that for a day or two, and then we had another conversation and I told him to

(Testimony of W. T. Triplett.)

gather up all our collateral and bring it to Spokane, which he did. When he came back to Spokane we discussed his future and decided we needed him in Yakima to look after the items that he had in his possession, and he has been so occupied since that time except an occasional few days when we would send him out to some correspondent bank to go into their affairs with them. Mr. Buckholtz has been in our employ off and on since 1914, and Mr. Rutter and I always looked on him as our prize man; one of the coming young fellows of the bank; and we hated to see him leave the bank for we knew that he would develop into something better. Buckholtz had been out of our employ two or three times since 1914. He went to St. Joe, Idaho, and was cashier of the bank there for two years; absolutely disconnected from us. After that he came back and entered our employ. The Idaho bank was a small bank where there wasn't much opportunity for him to get credit experience [77] which he was desirous of getting, and we finally gave him a position in connection with our Credit Department. Later on, he went to Coos Bay in the employ of a bank there, but some time afterwards he came back to us and we hired him again. With these exceptions he has been in our employ since, although he might have gone out to relieve someone for a week or so in other banks. During his connection with the Coos Bay and Idaho banks, he had no connection whatsoever with us. The peak of the deposits of the Spokane & Eastern

(Testimony of W. T. Triplett.)

Trust Company was on 31st December, 1919; they amounted at that time to fifteen million and some hundred thousand dollars. They commenced to decrease after that. In January, 1920, I think our deposits were running $11,000,000. Some time in January, 1921, they shrunk to $9,400,000, or a shrinkage of some $6,000,000 in a period of little more than a year. This decrease was caused by the general change in financial conditions. Some of the banks suffered likewise and some did not. At the present time our deposits are somewhat over $9,000,000. The changes I have mentioned are just in the ordinary course of business. As an illustration of how deposits decreased: December 31, 1919, country banks had on deposit with us more than $6,000,000; last fall their deposits were less than $2,000,000. We have always rendered more or less assistance to country banks, but especially beginning in the latter part of 1919. The territory over which that assistance extended was from Tacoma on the west to Forsythe, Montana, near the Dakota line, on the east, and from Republic, Washington, down as far as Hollister, Idaho, which is near the Utah line. I am not prepared to give you the exact number of banks we were assisting in one form or another during that time, but it was more than seventy-five and less than one hundred. We would lend them on bills payable secured by collateral; we would rediscount their customers' notes with the bank's endorsement; we would sometimes buy notes outright from them that they wanted

(Testimony of W. T. Triplett.)

to sell so they would not have to endorse them, and there were times when we loaned directly to the bankers, that is, to the men instead of the banks. I don't know the date exactly, but I think the peak of our assistance in that way was in the midsummer of 1920, when we had a little over three and a half million dollars that we had loaned to country banks. It has now gotten [78] down to about $1,280,000. In July, 1921, it was $2,600,000 and has been going down since just in the ordinary course of dealing to the figure mentioned. There has been no change in our policy. I think we first began to render assistance to the Central Bank in the spring of 1920. I do not recall the particular circumstance except they applied for credit in the usual way, and we decided to carry some rediscounts for them. From that time on, it continued as shown by the exhibits and by the evidence here. We had no different arrangements with them than we had with other country banks. At the peak the total sum we had invested in assisting the Central Bank was $212,000. When its doors closed, the amount was less than that, but I haven't the figures here. This was a large sum, but we had a great many other exceptions along the same line. We had a bank at Moscow we loaned over $100,000 to, including loans and rediscounts; one at Waterville, more than $175,000; a little bank at Almira, about $85,000; a bank at Republic, $75,000; a bank at Wenatchee, $275,000; and a bank at White Bird, $200,000. Of course

(Testimony of W. T. Triplett.)

many of the banks we were assisting were in small sums. Aside from the Central Bank most of these banks weathered the storm, though some did not. There was a bank at Nez Perce that we had quite a large sum loaned to, a bank at Kamiah and Orofino; a bank at Lind; one at Grangeville, and there might be one or two others, were closed. Notwithstanding our assistance, they had to close their doors. As to the question of assistance to the Central Bank & Trust Company, I don't think at the outset it was a question of rediscount, but of borrowing in one form or another. They had two forms of borrowing. They would send us their notes secured by collateral and rediscounts bearing their endorsement or guarantee; of these borrowings $20,000 was secured by Liberty Bonds. Later, they wanted to get an additional sum and they wanted to know if it would be satisfactory to us to dispose of the Liberty Bonds and give us notes for collateral. They sold them to Mr. Barghoorn, but the transaction left us with some slow paper behind the note instead of the Liberty Bonds we had to begin with. On the rediscounts, the system we had was to send the rediscounts to them ten days before they were due, write them a letter, and under the arrangement we had with them we were to charge their account on the due date whether they were paid or not. That custom was followed generally until they got into an overdraft. They had considerable overdrafts [79] in January and I didn't like it. The custom of recharging the

(Testimony of W. T. Triplett.)

discounts on the due date was generally followed until about January 1, 1921. In rediscounting notes, we required financial statements showing the solvency of the borrower and the assets from which he could liquidate the note at maturity. Sometimes the bank's supply of those notes would be more or less depleted; they did not have any more left and we would then take notes that we considered good, but slow. We didn't aid any banks unless they were asking for financial assistance, and the reason they were asking for it was that their resources had run down through shrinkage in deposits, or for some other cause, so that in all of this work we were doing, we were dealing with banks that were in a greater or less degree of trouble, present or anticipated. The assistance we rendered was extended to both members and nonmembers of the Federal Reserve System. Some of the banks which were members of the Federal Reserve System came to us and borrowed without going to the Federal Reserve because they had accounts with us and felt they could lean on us. I first heard of the draft drawn on us by the Central Bank & Trust Company in favor of the Seattle National Bank on the morning of 25th January through a letter from Mr. Buckholtz dated 24th January. The letter begins: "Looks pretty nice to get a slip showing a $39,000 balance for Saturday, but, now, wait until that big draft hits you to-morrow or Wednesday, which together with draft charged back will mean an overdraft of probably

(Testimony of W. T. Triplett.)

$15,000 again." That was the first information I had of any outstanding draft of that sort. When I read it, I went to Mr. Rutter to tell him that they had drawn on us for some large amount, evidently. Mr. Rutter picked the letter up and started to read it, and then he took a letter from his desk and handed to me, and I read it, and it mentioned the amount of the draft. That was the first I heard of it. The letter which Mr. Rutter handed me is the one stating that a $51,000 draft on us had been sent to the Seattle National Bank and in which it was said "If you pay it, the overdraft created will be the limit to date of credit advanced this institution." That was the first intimation I had that any draft of this sort was outstanding. After Mr. Rutter and I had read those two letters, we went to our Executive Committee meeting, and I went to the country banks department [80] and found out how much they had on our books so as to be able to tell the Executive Committee [81] what the status was, and when we saw that it was going to overdraw their account $27,000 if we paid that draft, we went into executive session and decided not to pay it. We notified Mr. Barghoorn of our decision and Mr. Rutter got in touch with Fred Ross. We had some difficulty in getting hold of Mr. Barghoorn, and I think it was some time about 3:00 o'clock in the afternoon before he was notified of our decision. I had no telephone communication on that subject whatever with Mr. Buckholtz. I would not have discussed the ques-

(Testimony of W. T. Triplett.)

tion of the draft and what the bank was going to do about it over the telephone; absolutely and unqualifiedly those letters were the first intimation I had of any such draft. The stamp which appears on the letter to Mr. Rutter is placed there by the mail clerk who receives the mail, opens it and distributes it. He places a time stamp on each letter as he opens it, and that stamp shows that the letter was received at 8:00 o'clock on the morning of 25th of January. I called Mr. Buckholtz up on the 25th. We first talked about some Liberty Bonds Mr. Barghoorn had back of his notes and I told him about those bonds having been disposed of. Then when we decided to charge certain mature notes to the bank's account, I called him up and asked him to get a pencil, I was going to make some charges against his account and make them right now. He didn't discuss it or ask me any questions about it, but directed me to wait a minute and got a pencil and came back and said "shoot," and I gave him a list of the notes and what they were for, and after we had talked about them for a few minutes I hung up the phone. I am not positive whether I at that time communicated to him the decision of the bank not to pay the draft. The draft came into the clearing long about noon on the 26th and was rejected pursuant to our previous decision. I didn't tell Mr. Buckholtz in any of our conversations on that day to be sure and get those charges in on the books of the bank that day. I didn't know what they were

(Testimony of W. T. Triplett.)

going to do; I merely told him what we were going to do. The remittance from the Central Bank bearing date January 21, 1921, containing the $45,000 draft, the $3,000 draft, and a number of smaller items aggregating $48,594.65, was received at our bank about 9:00 o'clock on the 22d January. I didn't see that remittance as we have a mail teller who handles such matters and this was just entered on our books to their credit in due course. [82] My attention was called to the remittance in this way: The lady who keeps the country bank ledger places on my desk each morning a list of the country banks' overdrafts. The 22d was on Saturday, and on Monday, the next business day, when the overdraft list was placed there, I noticed that the name of the Central Bank which had been there most of the time, with a few exceptions, was missing, and I thought she had made a mistake, so on my way to the executive meeting I stopped and asked her if she had not forgotten that name, and she said that it had made a big deposit. I asked her to show me and she turned to the ledger sheet which showed a quite sizeable balance, $38,000 or some such amount, and I afterwards looked it up and found the deposit slip. The aggregate of the deposits which the Central Bank made with us are shown in the statement that was introduced in evidence and that corresponds with our books, allowing for the difference in time. There was nothing to direct my attention to that particular deposit slip except it was a good sized amount, and

(Testimony of W. T. Triplett.)

I was glad to see it. There was no letter accompanying it, just the slip, and I had no information on the subject except what the deposit slip gave me, and I received no other information before the 25th as to it. That deposit was received and carried to their credit about 11:00 o'clock on the morning of the 22d of January; on the 21st there was an outstanding draft against us came in for $9100; on the 22d, one for $500 and one for $58.50; on the 24th, one for $5.76; one for $303.75, one for $1438.62, and one for $17,789.38. These drafts were paid in due course by the bank and they were what depleted the balance so that the cash balance at the end of business on the 24th in favor of the Central Bank & Trust Company was a little more than $24,000; no drafts drawn against us by the Central Bank came in on the 25th. We paid some drafts on the 26th after that came in. Between then and the morning of the 26th we received a remittance from them of $921.21 and one for $143.09. There were other credits on the account put on that day, notes that they had sent us for rediscount. I think the balance was less than $2,000 at the close of business on the 25th after we had charged off other matters. On the 25th, we charged up [83] rediscounts. After we decided not to pay the draft, we decided that we would charge up past due notes to the amount of $25,672.64. We only charged up past due notes, notes that were supposed to have been paid on their due dates. When that was done it would leave the

(Testimony of W. T. Triplett.)

account less than $2,000. I would have to get the figures to be exact on that. No confidential matters were discussed between Mr. Buchholtz and me over the long distance telephone; we would not discuss any matters over the telephone that might get to the public and be detrimental to the bank. Matters of importance that we would not object to anyone hearing would be discussed over the telephone, but nothing concerning the welfare of the bank; such matters were committed to written correspondence. The Central Bank had had an overdraft with us for some little time, in fact during the year 1920, and running along into January, 1921. In the early part of January we told Mr. Barghoorn that we were not going to pay any more overdrafts. In fact, the Executive Committee went on record against paying overdrafts for any country bank, but we didn't adhere to that rule rigidly because a check might come in and if we turned it down it would embarrass the bank, so we were more or less lenient. However, he was informed along in January that he must cover the overdraft and keep it covered, and after he hired Mr. Buchholtz and took him to Yakima they sent us enough rediscounts to cover the overdraft. That meant that we were carrying a much larger sum for the bank than we had been in spite of continued rediscounts and the substitution of collateral that would enable him to sell his Liberty Bonds, the account kept being overdrawn, and it ran into quite a considerable figure. It got to a place where we

(Testimony of W. T. Triplett.)

thought it was out of all reason. The paper that was coming in to us was not of the highest type; it looked like it might be a little slow to realize on, and when we had as high as $200,000 loaned to the bank, we felt it would be foolish to burden ourselves with paper that might ultimately be a loss. The paper simply wasn't satisfactory, and we decided that if we paid the overdraft of $27,000, all we could get for it would be a [84] bunch of paper that wasn't satisfactory, as the paper that had been sent us before was not satisfactory, and so we decided we would not pay it. That was the sole reason for our refusal. Prior to the time Mr. Buchholtz went to the bank in the month of January, our source of information as to the condition of the bank and its prospects and outlook was either Mr. Barghoorn or Mr. Ellis. After Mr. Buchholtz was hired, he did all the corresponding. He kept us informed by letter and telephone. Outside of what he may have said on the telephone, the letters in evidence gave us the total information as to the condition of the bank. Nothing that would reflect upon the condition of the bank was talked over the telephone. I don't think anything serious was talked in that way because we would not have discussed it over the telephone. Up to the time that I read the letter to Mr. Rutter dated 23d January, I had no idea that the bank was insolvent or would go on the rocks. We had letters from Mr. Buchholtz from time to time; some days he would feel discouraged,

(Testimony of W. T. Triplett.)

and the next day he would say things were coming along fine; that is all we knew about the condition of the bank. I don't recall having any talk with Mr. Barghoorn after Mr. Buchholtz went down there except to show him some letters I had from Mr. Buchholtz.

On cross-examination the witness testified as follows: The rendering of financial assistance to other banks was done in the regular course of our banking business. When we loaned money we charged interest for it, and when we rediscounted paper we would not take any that we did not think was good. We expected that by extending assistance to these banks, a willingness would be created to bring other business to us. We were willing to assist the Central Bank, but did not wish to lose money in doing so. I am fond of Mr. Buchholtz personally and consider him a very valuable man. I wouldn't like to lose him, but we have men higher in our organization that we have let go to smaller banks if we felt it was for their interest, and we thought it was a good opportunity for Mr. Buchholtz to go to Yakima and work up business for himself. He is a married man, and his wife did not leave Spokane. His home is in Spokane and he is still [85] living there. When he came down here I thought we had lost him for good. When I said in the letter of 5th January to Mr. Ellis that "We have, after talking to Mr. Barghoorn, credited you with $12,681.05 to cover the proceeds of the rediscounts

(Testimony of W. T. Triplett.)

sent by you. Two of the notes were not altogether satisfactory, namely those of J. L. Parker and the Western Fruit and Produce Company; but as Mr. Buchholtz, who is one of our right hand men is accompanying Mr. Barghoorn to-night, he will endeavor to obtain substitution of other paper." I understood that Mr. Buchholtz was going to endeavor to obtain the substitution of other paper for the Central Bank to enable it to secure money. We turned those notes down, but took them temporarily in order to tide them over. It was our paper subject to their getting something else that would be satisfactory. When I said that Mr. Buchholtz is our right hand man, he had been with us a great many years and we had not yet got to the place where we realized that he was gone. After the Central Bank closed its doors, he was back on our pay-roll immediately. I know that the liquidator in charge of the Central Bank has refused to allow Mr. Buchholtz' claim for salary because he said that it was not established to his satisfaction that Mr. Buchholtz was on their pay-roll. I didn't like the way Mr. Ellis handled our rediscounts. If we were going to render such assistance to the Central Bank as it requested of us and needed, we felt it ought to have a man there who would be able to pick out the kind of paper that would be satisfactory to us. If the Central Bank wanted to get the assistance, it was up to them to put somebody in there that would do it our way. They could not get assistance unless

(Testimony of W. T. Triplett.)

they furnished us the kind of paper we wanted, and I had sufficient confidence in Mr. Buchholtz to believe that he understood our requirements and would be able to do it. We didn't want Mr. Ellis to get hold of our rediscounts at all. Mr. Ellis was cashier of the bank, but we knew Mr. Buchholtz' confidential relations with Mr. Barghoorn and that Buchholtz would ultimately succeed Ellis as cashier of the bank. During Mr. Buchholtz' stay in Yakima he did not write to Mr. Barghoorn, but he wrote letters to me that I showed Mr. Barghoorn. Thereupon the following questions were put to the witness by counsel for the plaintiff, and the following answers given: [86] Q. You knew of Mr. Buchholtz' confidential relations with Mr. Barghoorn, and yet during all of Mr. Buchholtz' stay here he never wrote a letter to Mr. Barghoorn?

A. No, but he did write letters to me that I showed Mr. Barghoorn.

Q. Sure, that is the way it was done; that is the way Mr. Buchholtz communicated everything he had to say to Mr. Barghoorn, whom you claim was his employer,—did it by writing to you direct, and you showed it to Mr. Barghoorn if you chose. That is true, isn't it? A. If I chose, yes.

There was a run on the Central Bank during the first of January. After it had been going on for three or four days, we heard they were having some heavy calls. On the 5th of January Mr. Buchholtz went down with Mr. Barghoorn. When

(Testimony of W. T. Triplett.)

Mr. Buchholtz went to Yakima, the Central Bank owed us $142,000. Some time afterward, in January, it went up to $212,000; that was made up largely of rediscounts which Buchholtz sent us. When the account was closed, I think the amount of the Central Bank's indebtedness to us was $182,000, but it might have been $162,000; I can get the figures later. After January 1st, we charged some rediscounts back promptly and some we didn't. The main reason we didn't charge them all back was because we didn't want a big overdraft on the books. We own a rediscount until it is either taken up by the bank or paid. We changed our policy in January of not charging back rediscounts after they were dishonored because we didn't want any overdraft increases. The Central Bank owed us $142,000, part of which was secured by Liberty Bonds and might be eliminated from the calculation, but later on they had run the amount up to $212,000 and we had to render assistance on [87] paper that we considered slower. We had increased the load we were carrying for them and did not want to carry an overdraft in addition. If we had charged the rediscounts up to them and returned the paper, we would have had merely a bank overdraft, while if we held the paper we would have something to show for it. We would rather have a past due note than an overdraft. We held some fruit drafts that we didn't charge up for a long time. They are a different thing from rediscounts because they

(Testimony of W. T. Triplett.)

are dependent on the arrival of cars, transportation facilities, etc. When I said to Mr. Buckholtz in a letter that I was enclosing a list of outstanding fruit drafts some of which were a hundred years old, more or less, that was just a figure of speech. They had been out for some time. As soon as the fruit began to move, the Central Bank made arrangements with us whereby they were to send us drafts drawn payable on arrival of cars with bills of lading attached. They would send them to us like any other cash item and we would give them credit for them, and when they were paid we would charge interest for the time they were outstanding. If any of the drafts were dishonored, or the apples froze in transit, or any other condition of that kind, we charged the drafts back to the Central Bank. We usually try to give them all the time they need to get the drafts paid so as not to be charging something back that would reduce their account and disturb their reserve. It was the same arrangement we had with some other banks. I first learned of the outstanding draft of $51,000 on 25th January. This was through a letter written by Mr. Buckholtz on the 23d to Mr. Rutter. At that time the Central Bank had a credit balance with us of about $24,000, and we charged back to them enough rediscount paper to cover that balance. I called up Mr. Buckholtz and told him that we were going to make these charge-backs on our books. I did this because I knew it would disturb their reserve and it would be up to

(Testimony of W. T. Triplett.)

them to raise funds somewhere. If I had waited to advise him by mail, he would not have known of the charge-backs for another day, and we wanted him to know right away. Mr. Buckholtz said in his letter that if the draft was not honored the bank would be busted, but I didn't know whether that meant anything because there are plenty of ways for raising money at the eleventh hour. If we had paid that $51,000 draft, the Central Bank account with us would have been overdrawn some $27,000. They had had as large an overdraft [88] as that before, but we didn't want to go on and create another overdraft. They had an overdraft with us almost continuously during the month of January and until they sent us some thirty thousand odd dollars worth of paper that practically wiped that out and eliminated the overdraft. My attention was directed on the 24th to the large remittance received on the 22d. I found out they had sent us a remittance of forty-odd thousand dollars in which were two large items, one not exceptionally large and the other of considerable size, $45,000.

Testimony of R. L. Rutter, for Defendants.

R. L. RUTTER on direct examination testified as follows: I am president of the Spokane & Eastern Trust Company; have been with that company for about twenty-seven years. The general policy of the company toward getting employees for other banks and extending financial assistance

(Testimony of R. L. Rutter.)

to other banks is as testified to by Mr. Triplett. I believe Mr. Barghoorn bought the control of the Central Bank in the first half of 1919. Shortly afterwards he arranged with me for our bank to act as his correspondent. It was just the ordinary arrangement with the country bank; we acted as their correspondent, taking rediscounts, etc., as the business demanded. In the latter part of 1920, Mr. Barghoorn told me it was necessary for him to get someone to succeed Mr. Ellis. He negotiated with Mr. Richards, a gentleman connected with the Spokane & Eastern. Mr. Richards went to Yakima for a day or two and decided not to take the offer. Mr. Barghoorn continued to inquire about getting someone, and finally he decided to employ Mr. Buckholtz. I had known Mr. Buckholtz well since 1914. I keep in close touch with my employees, have an actual personal acquaintance with all of them and am on friendly terms with them. I had a great deal of confidence in Mr. Buckholtz and have yet. The only conversation I had with him about the matter was when he came to me and asked if we were trying to get rid of him. I assured him we were not, but thought it a good opportunity for him and a good thing for Mr. Barghoorn. He was concerned about the reason for our recommending him for the place. We knew about his being employed and approved of it. There was no understanding, express or reserved, on my part, or the part of the bank, or anybody connected with it, that Mr. Buckholtz should go to

(Testimony of R. L. Rutter.)

Yakima as the agent of the bank. He severed his connection not only in form, but in fact, with our bank. Upon my conscience and without reserve of any kind or [89] character whatever; that is the whole truth. I first heard of this $51,000 draft by a letter from Mr. Buckholtz dated 23d January and received 25th January. That is the first I had heard of it in any shape, manner or form. I do not think it was possible that any other employee or officer of the bank could have been informed of it before. If anyone from Yakima had called up to tell our bank of such a draft, I would have been informed. Mr. Triplett brought his letter down dated a day later but received the same morning, and we went into the Executive Committee and there determined not to pay the draft, after calling in and consulting with our attorney Will Graves, who is a member of our board of directors. During the time Mr. Buckholtz was in Yakima, we had no idea that he would act as the agent of the bank. After our employees leave us and go to other banks, they frequently write us telling us their troubles and asking advice, and come to us for help, which they generally get. With respect to the severance of Mr. Barghoorn's connection as a director with our bank, a few days before the annual meeting he came into my office and said that he didn't care to be elected at the next meeting. He gave no reason, and I told him it would be all right; that was all there was to it. With respect to the letter from Mr. Buchholtz re-

(Testimony of R. L. Rutter.)

questing me to extend my good offices to keep the bank examiners away from him if possible, I did nothing about that in any way; never mentioned it to anyone nor directed anybody else to. I am sure I could not have done it if I had tried to, but I had no notion of doing it anyhow. I remember the meeting of the Guaranty Board testified to by Mr. Hay. The Governor said something about a draft having been turned down, and I told him that I didn't think it was possible; then something was said about somebody being over there, and I said Mr. Buchholtz was there working for Mr. Barghoorn. I told him who Buchholtz was and that I knew he was a good man, and so on. Whatever form of expression I may have used, I did not intend to convey the idea that he was over there representing us, for I had no idea of that kind in my own mind. I don't remember that date, but if it was the 22d, as testified to by the examiner, no draft had been turned down then and I had not heard of any [90] draft that was likely to be turned down, and didn't suppose any would be. [91]

On cross-examination the witness testified as follows: This matter between the Governor and the Bank Examiner interested me in no other way than in the general welfare of the financial interests of the state. My recollection is that it was said that a draft had been presented and not paid. I didn't ask the Governor not to press it. As I remember it, I told him that Mr. Buckholtz, a good

(Testimony of James A. Loudon.)

man, was over there in the employ of Mr. Barghoorn.

Testimony of James A. Loudon, for Defendants.

JAMES A. LOUDON, on direct examination testified as follows: I am connected with the First National Bank of Yakima. Commencing with the 1st of December, 1920, and going on during the month of January, 1921, in a period of six weeks, there was a decrease of about 13% in our deposits. It was a gradual decrease caused by the cessation of fruit shipments.

On cross-examination the witness testified as follows: There was no run on our bank, that happens every year. I heard there was a run on the Central Bank in the early part of last January.

Testimony of H. C. Lucas, for Defendants.

H. C. LUCAS on direct examination testified as follows: I am president of the Yakima Trust Company. There was a decrease in the deposits in our bank of about 16% during the latter part of December and January, 1921. It was caused in the same general way that Mr. Loudon spoke of.

Testimony for Charles Heath, for Defendants.

CHARLES HEATH on direct examination testified as follows: I am connected with the Yakima Valley Bank. During the latter part of December, 1920, and January, 1921, there was a decrease of deposits in our bank of about 13%.

Testimony of W. F. Buckholtz, for Defendants.

W. F. BUCKHOLTZ testified on direct examination as follows: I am the Buckholtz that has already testified for the plaintiff; I am 28 years of age; was born in Minnesota of German parentage. I first entered the employ of the Spokane & Eastern Trust Company in the early part of 1914 as bookkeeper. I continued in that capacity for a year or two; then went out to a country bank for about two months while the cashier was away. I was just employed to take his place and recommended by the Spokane & Eastern Trust Company. [92] When I came back I returned to the employment of the Spokane & Eastern, but during that summer there were several times that I went out to other banks temporarily to relieve people that were on vacations or sick. I went on the recommendation of the Spokane & Eastern, but the bank to which I went paid my salary. In February of 1916, on the recommendation of the Spokane & Eastern, I got the position as cashier of the First State Bank of St. Joe, Idaho. I was with that bank a little over two years, and then went back into the credit department of the Spokane & Eastern, remaining with it continuously for two years, about. Then I severed my connection with the Spokane & Eastern and went to Myrtle Point, Oregon, and acted as cashier of a bank there for about four months. I went there on the recommendation of the Spokane & Eastern, and after I quit I took a little trip and

(Testimony of W. F. Buckholtz.)

finally dropped into Spokane and went back to work. I have had no other employment by any other bank since that time until I came to Yakima. Somebody told me that Mr. Barghoorn wanted to see me, and I went to his office and had quite a lengthy conversation with him. He told me that he knew that I had had considerable credit experience and that Mr. Rutter had recommended me very highly as a man who was capable of handling credit in his bank at Yakima. I didn't give him an answer at that time. I was surprised at his proposition and felt as though Mr. Rutter wanted to get me out, and it kind of hurt my feelings, and I went to Mr. Rutter and had a talk with him. He assured me that it was not a question of getting rid of me, but that it was a mighty good thing for me; and after talking it over with him I told Mr. Barghoorn I would go. Mr. Barghoorn told me that he eventually intended that I should supersede Mr. Ellis and be cashier of the bank. I left that night with Mr. Barghoorn to go to Yakima and had another long talk on the train. He explained to me in detail what my duties were to be, to work together, to work into the credit; what I was to do; what Mr. Ellis was to do, and how to get along. Thereupon the witness testified as follows: "I asked him who I was to look to as my boss, if there was going to be a boss and who it would be, and he said there would be no one between he and I; I said, 'Well, you have a cashier there,' and he said, 'That part of it [93] is all right, eventually I intend

(Testimony of W. F. Buckholtz.)

for you to be cashier.' " At that time I totally and completely severed my relations with the Spokane & Eastern. There was no express, implied or inferred agreement on my part, or any suggestion of any sort made to me by anybody that I was to be in Yakima as a representative of the Spokane & Eastern, and I did not understand, suppose or infer [94] that I was to be. I remember the correspondence with Mr. Triplett in which I said, in substance, that I saw no objection to taking rediscount paper as it came due and holding it as agent of the Spokane & Eastern. It first came up in this manner: A borrower would come in to deal about his note, to make changes, renew or reduce it, or take security, and the note would not be in the bank; it was in Spokane. It made it inconvenient, and I wanted Mr. Triplett to send the notes that were past due, or nearly due, down here, and told him I would look after them for him; that is, look after collections and renewals, and would return the renewals, and so on. I was going to do that in my individual capacity and was not going to be paid anything for doing it by the Spokane & Eastern. It was just for the accommodation of the Spokane & Eastern and also for our benefit. I wanted to reduce the rediscounts as rapidly as possible. In my conversation with Mr. Barghoorn on the train he talked to me about the handling of the rediscounts. He explained to me that the Spokane & Eastern had complained about the shape the rediscount notes would get in; that they would not

(Testimony of W. F. Buckholtz.)

have sufficient information on them for the bank to ascertain whether they were good liquid paper, or sound or not, and the result was that it entailed a great deal of correspondence before they would get anywhere. He said Mr. Rutter had told him that I knew pretty well what their requirements were and what was necessary for them to pass on a note, and that he felt it would save a lot of confusion and delay. When I got to Yakima, I took charge of the collections and the paper, what is generally called the Credit Department. I did the bulk of that work, although I would consult Mr. Ellis very often and occasionally he would handle a matter by himself. A great many times, however, I would handle it without consulting him. I tried to run it in the same way that I would run the affairs of any other bank. In some of these letters, I speak of not having nerve enough to send them certain kinds of paper, etc. That did not refer to the soundness of the paper, but to its liquidity. In January, the Spokane & Eastern was not financing crops for that year that on the face of them the notes would not be paid until the fall of 1921. They held me to paper that had the actual commodity behind it and which would be liquidated in a short period. They commenced to make payments on the crop in 1921, usually in April, May and June, so what I said about those notes not being good, and so on, unless otherwise [95] explained, refers to their liquidity. My letters and telephone calls between Yakima and Spokane were with Mr.

(Testimony of W. F. Buckholtz.)

Rutter and Mr. Triplett, except a time or two that I called up Mr. Hubbard. I communicated with Mr. Rutter because he was the president of the bank and with Mr. Triplett because he had the management of the country bank business for the Spokane & Eastern. The calls to Hubbard did not relate in any way to the business of the Central Bank. He had a good-sized post-dated check on the First National Bank of Yakima for collection, and he wanted it promptly presented for payment the day it matured, and he sent it to me and asked me as a personal favor to attend to it for him. With respect to my wife remaining in Spokane while I was in Yakima, I have my own home in Spokane and my wife and family have lived there for quite a while. We don't change about very much. When I went to Myrtle Point, which is a long ways off, and was there for two or three months, I left her in Spokane at that time. That did not imply that I expected my employment would be temporary. I expected it to be permanent, and if it had been I was going to bring her to Yakima. I remember the occasion I went to see Mr. Louden at his bank and gave him a card. The occasion of my going into his bank was that I wanted to get his ideas as to crop movement and conditions and the general tendency in Yakima at that time, and I dropped in there one noon and introduced myself and told him I was over at the Central Bank, and he said that he understood someone was there from the Spokane & Eastern and asked if I was, and I said

(Testimony of W. F. Buckholtz.)

yes. Before I left I gave him one of my cards. It happened to be the only cards I had; it was the same kind of a card that I gave Miner of Seattle. I had had those cards printed a couple of years before that, while I was working for the Spokane & Eastern. I had quite a large supply. They were the only business cards I had and it was for that reason that I used them. As to the conversation with Mr. Miner, I came out of the hotel with him and some other men, and I asked him if he was from the Seattle National Bank, and he said yes, and we introduced ourselves, and he asked how I spelled my name. I told him it was a hard name to remember and I gave him one of these cards. He asked how long I had been with the Spokane & Eastern, and I said probably five or six years. We had no [96] other conversation of any length except a few words down in the Central Bank. Minor and Nossaman were there gathering information, and one of them asked if I knew how this happened, and I said yes, and offered to assist them in gathering the facts. I was there and doing nothing. I cannot recall what the conversation was, but we did talk about it as we stood around there. I don't recall that I said the bank would not pay more than 30%, but it is quite possible that I did; that was a wild estimate. I was down there during those conferences and heard the list of losses that the Yakima banks had piled up, and it was apparent to me, after seeing what they aggregated, and there were various estimates, some joking and

(Testimony of W. F. Buckholtz.)

some serious, mentioned after all hopes had been given up, and I believe they estimated losses at about $100,000, and I took into consideration their deposits and the amount of paper in the pouch, and lumped it off at about 30%. I was confident those local bankers knew what they were talking about. I don't remember saying what the percentage would be, but that is about the way I thought about it after hearing the Yakima bankers at the conference. I did not tell Miner that I had telephoned the Spokane & Eastern of the drawing of this draft. I didn't telephone the Spokane & Eastern about it. I never talked about that draft to anybody at any time. I did not communicate the fact of that draft having been drawn to the Spokane & Eastern by any other means than the two letters, one on the 23d and the other the 24th of January. I didn't communicate to any of the officers of the Spokane & Eastern Trust Company anything about the condition of the bank, except current business, save as it appears in the letters that have been put in evidence, and so far as I know those are all the letters that I wrote them. The cash letter which the Seattle National Bank sent with its collections was never seen by me. The first I knew about it was late in the afternoon, when I think the bank was closed. I was in the habit of occasionally dropping around to the draft register and I saw a draft registered on the book drawn on the Spokane & Eastern, and I immediately asked Mr. Lemon what it was, and that was my first knowledge of it. He went on to

(Testimony of W. F. Buckholtz.)

explain what it was. I had not talked those collection items over with Mr. Ellis when [97] they came in. My first knowledge of their receipt was when I saw the draft registered on the register. I think Mr. Lemon called my attention to the two large checks in the remittance letter draft. He called my attention to how it occurred. He said there was a large collection letter which came from the Seattle National Bank, and the items had been put in the clearings and settlement made and a good-sized remittance was coming to Spokane as a result of what they won in the clearings. Just what items were going to Spokane I didn't know until about a month ago, since this lawsuit has been started. I didn't know what items went to Spokane, what kind of drafts, or what the items were until after the lawsuit was started. I didn't know the method of clearance in detail while I was employed at the Central Bank. I knew it was done through the Yakima Valley Bank, but I didn't go into it because I had nothing to do with that department. I first knew Mr. Triplett when I was a schoolboy in Spokane, and he and I have been friends for a good many years. During the time of my employment in the Spokane & Eastern, I had a great deal to do with him outside of our business relations. We were on very friendly and familiar terms and I was very fond of him.

On cross-examination the witness testified as follows: During the last two or three years I have

(Testimony of W. F. Buckholtz.)

only been at home about a fourth of my time. The occasion for my being away so much was working in other banks, and sometimes an occasional trip. The last bank I was employed in was at Myrtle Point in the spring of 1919. The witness then went on to enumerate a number of banks in which he had worked temporarily to relieve persons from president to bookkeeper absent on vacation for periods ranging from two weeks to two months. "When I got through I went home." Resuming, he testified: In my conversation with Mr. Loudon he asked me if I was making an audit or going through the assets, and I said I was working on that; I had been doing something along those lines. I believe I told him I had done such work before, but I don't know that I said I had just finished such a job. I have occasionally in calling on a bank, or sent out to a bank in places [98] where they were friendly, gone over the assets and made reports as to classifying assets in different classes. My first conversation with Mr. Barghoorn about going to Yakima was shortly after New Years. I think it was on the day that I went to Yakima. I don't remember exactly the time of day when I had the conversation with Mr. Barghoorn and Mr. Triplett. I think my last conversation with Mr. Triplett was late in the afternoon because he was signing his letters, and he usually does that about 5:00 o'clock. I went home early and told my wife I was going to Yakima. I left with Mr. Barghoorn on the 6:30 train that night. When I went to Yakima

(Testimony of W. F. Buckholtz.)

I had no understanding with the Board of Directors of the Central Bank. The first money I drew from the Central Bank, if I remember correctly, was the 15th of January. I think it was $80. That wasn't expense money. The employees were paid twice a month and Mr. Ellis had made out the pay checks. He asked me if I wanted any money, and I said that perhaps I had better draw some, and he asked me how much, and I didn't want to draw more than I had earned, and I just estimated in a hurry that there would be $80 coming at least, and asked him for that. I drew another $100 later in the month, the 25th or 26th. From time to time there were substitutions of notes which had been rediscounted for the Spokane & Eastern. I attended to the substitution. I would select from the bills receivable of the Central Bank the notes that were to be sent to the Spokane & Eastern for rediscount. Frequently notes rediscounted by the Central Bank had to be renewed. I handled all those notes. When a man came in, I talked to him, and if there was a renewal made, I made it. The Spokane & Eastern sent those past due notes and rediscounts direct to me after I had been there for a while. The correspondence will show when that commenced. I reached Yakima on the morning of the 6th. I did not pay any attention to items that came into the Central Bank by mail unless it happened to be something in payment of a note. In that case it would probably be turned over to me. I wasn't working on the lines of the remittances received

(Testimony of W. F. Buckholtz.)

by the bank, but I made a practice of looking to see what our statement was every night. I knew substantially the amount of [99] remittances that the Central Bank made to Spokane on 21st January. I didn't see the remittance letter to Spokane. The remittance of $48,000 didn't escape my attention. I saw on the draft register that this had occurred and I asked Mr. Lemon the nature of it. I saw this draft of $51,000 on Spokane before it went out. It was a good-sized one and I knew the Central Bank didn't have any money in Spokane to meet it unless they were sending money there for that purpose. I asked Mr. Lemon if we had lost any in Spokane that day and he said no and I understood from that that there was enough going to cover it. I understood that our balance didn't depreciate any, that there was something else went to our credit, because we didn't lose there. I took it for granted that there was a remittance going to Spokane of approximately that size. Thereupon the following questions were put to the witness by counsel for the plaintiff, and the following answers given:

Q. Did you make any inquiry of Mr. Lemon as to what it was, how it happened he had enough to send to Spokane to meet a draft of that size?

A. Well, I took it for granted that there was a remittance of approximately that size going.

Q. Didn't it excite your curiosity at all as to where it came from, that amount of money?

A. Yes, I have already explained I asked him the nature of it and he told me.

Testimony of W. T. Triplett, for Defendants.

W. T. TRIPLETT testified on direct examination as follows: Concerning the figures I was asked about a while ago, I have taken them from the statement of the Central Bank. At the close of business on 24th January, the Central Bank had a balance of $24,682.58 on our books. Some time during the 25th, we received cash letters and also rediscounts from the Central Bank which were credited to their account, giving them a balance of $31,704.03 on our books. However, those [100] entries did not all go on the books at any one time. Other items may have been on before that happened, and I don't think you will ever find a balance of $31,000 on the books at one time. After we had charged up the rediscounts that were past due and had made some other charges of exchange and interest, and two or three fruit drafts, the Central Bank had a balance of $170.92. I don't think there were any drafts paid on the 25th January, but there were on the 26th. The Central Bank owed us at the close of business on the 25th one hundred sixty-two thousand odd dollars. That included bills payable and rediscounts, and that was $20,000 more than they owed when Mr. Buchholtz went to Yakima. The Central Bank owed us between $185,000 and $190,000 before we charged those items back on the 25th. The amount the Central Bank owed us when Mr. Buchholtz went away was about $142,000, part of which was secured by Liberty Bonds. The Liberty Bonds had been sold and in place of them we got

(Testimony of W. T. Triplett.)

slow notes, many of which are not yet paid. The character of the [101] notes we held when the Central Bank closed was very much worse than the notes we held when Mr. Buchholtz came over. That occurred in this way: We were in the habit of charging their account with the notes when they came due. It was up to them to make their account good after that was done. It was up to them to furnish us with notes that were satisfactory to us. As time went on, the notes became of a slower nature. They collected some of the better ones and we had up quite a little more money and had to take a slower class of paper for it. The notes became worse in the process of increasing the amount. The notes and other items that were charged back to the Central Bank on the 25th of January were turned over to the Central Bank and have never been in our possession since. They were sent to the Central Bank and so far as we know them must have gone into the hands of the receiver.

On cross-examination, the witness testified as follows: $142,000 of the $162,000 that the Central Bank owed the Spokane & Eastern was represented by rediscount notes; the balance of it by bills payable secured by notes. The bills payable was a note of the Central Bank & Trust Company in our favor. I am not sure whether Mr Barghoorn was an endorser on it or not. The condition of our account when the Central Bank closed was worse than when Mr. Buckholtz went to Yakima. We had $20,000

(Testimony of W. T. Triplett.)

worth of Liberty Bonds when he went over and we permitted the Central Bank to sell them and give us a bunch of slow notes. The scheme of improving the Ellis arrangement didn't have time to pan out. At the close of business on 25th of January, the Central Bank's balance with us was $170. We charged the notes to the bank on that day; they were past due and we had a right to.

On redirect examination the witness testified as follows: I heard Mr. Miner testify that Mr Barghoorn told him that before the blow-up the Spokane & Eastern had gotten $75,000 worth of collateral out of him. I cannot tell you when the Spokane & Eastern got collateral from him, but the Central Bank was borrowing from us, Mr. Barghoorn had some personal loans in our bank, and his bank in Colville also had some loans. In view of the amount that we were carrying in his interest we thought it only right that he should personally get behind such paper as we were carrying for him. We talked about the matter several times and finally it came to a head one night when [102] Mr. Barghoorn was going away. A paper was drawn up by which he endorsed all the paper we had of the Central Bank, Franc Investment Company, Sikko Barghoorn and the Colville Loan & Trust Company. We got an assignment of his profit in a dredging contract in Idaho. We didn't get anything out of it; the machine finally burned up. That occurred before Buchholtz came to Yakima.

It was stated that Mr. Barghoorn had been a director of the Spokane & Eastern Trust Company since 1908. [103]

There was introduced in evidence a sheet showing the debits against the general account of the Spokane & Eastern Trust Company with the Central Bank & Trust Company from the 3d to the 26th January, both inclusive, such debits being on account of rediscounted notes and cash items remitted by the Central Bank & Trust Company to the Spokane & Eastern Trust Company on the days hereafter shown. The amounts of the notes remitted for discount and the dates thereof were as follows:

January 3, 1921	$12,304.60
4, 1921	6,000.00
8, 1921	47,127.58
Sold note (Franc Inv. note)	11,000.00
January 11, 1921	21,250.00
Jan. 12, 1921	7,839.91
January 17, 1921	5,250.00
January 18, 1921	2,900.00
January 19, 1921	4,600.00
January 20, 1921	6,100.00
January 21, 1921	5,775.00
January 22, 1921	500.00
January 24, 1921	6,400.00
January 26, 1921	4,900.00

[104]

The cash letters or cash remittances during the same period showing the amounts and the dates thereof were as follows:

Date.	Amount.
Jan. 3, 1921	$6,663.37
4	3,443.33
5	4,416.35
6	4,429.12
7	4,746.13
8	792.05
10	17,908.41
11	6,138.55
12	637.14
13	6,336.78
14	1,347.14
15	6,918.45
17	6,815.20
18	16,818.37
19	2,974.50
20	3,731.73
21	48,594.60
22	2,449.28
24	3,985.73
25	6,907.41
26	794.96

[105]

There was also introduced in evidence a sheet showing drafts drawn by the Central Bank on the Spokane & Eastern Trust Company in favor of the Seattle National Bank covering remittance letters and paid by the Spokane & Eastern from January 14th to 27th of 1921; and showing also that these drafts were similar to many others in the files of the Central Bank covering several months. The particular items shown were draft No. 2242, dated 13th

January, 1921, for $1498.40, paid 17th January; No. 2239, dated 12th January, for $3294.71, paid 17th January; No 2241, dated 13th January, for $6319.36, paid 17th January; No. 2245, dated 14th January, for $12,784.77, paid 19th January; No. 2249, dated 17th January, for $2636, paid 20th January; No. 2250, dated 17th January, for $566.79, paid 20th January; No. 2252, dated 18th January, for $17,-798.38, paid 24th January; No 2257, dated 20th January, for $1438.62 paid 24th January; No. 2262, dated 22d January, for $541.22, paid 26th January.

Sheets were introduced in evidence showing cash letters sent by the Central Bank to the Spokane & Eastern Trust Company containing transfer drafts drawn by the Yakima Valley Bank during the months of October, November, December and January. Those showing drafts for considerable amounts upon the Fidelity National Bank of Spokane and the Bank of California of Tacoma were as follows: [106]

On October 11th, the cash letter contained a draft on the Fidelity National Bank for $13,000, the total cash letter being $13,286.25; On October 16th, there appeared a draft on the Bank of California of Tacoma for $31,000, total remittance being $33,301.68. On November 15th there appeared a draft on the Fidelity National Bank of Spokane for $20,000, total remittance being $22,298.23; on November 22d there appeared a draft on the Fidelity National Bank of $10,000, total remittance being $18,302.41; on December 13th, draft on the Bank of California of Tacoma for $5,000 the total remittance being

$8,047.89; on December 20th, draft on the Fidelity National for $8,000, total remittance being $8510.50; on January 10th there appeared draft on the Fidelity National for $4,000, the total remittance being $6041.46; on January 18th there appeared a draft on the Fidelity National for $11,000, the total remittance being $16,812.37. [107]

It also showed that the total amount of such cash letters during the month of October, 1920, was $421,447.31; for the month of November, 1920, $317,722.18; for the month of December, 1920, $156,440.67 and for the month of January, 1921, $151,548.60. [108]

The following letters are those which were introduced in one bunch as Exhibit "7" by plaintiffs. The letters signed by W. F. Buckholtz are all written upon letter-heads of the Central Bank and Trust Company.

Plaintiff's Exhibit No. 7.

Jan. 6, 1921.

W. T. Triplett, Secy.
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

(Separate Proposition.)

I am enclosing Franc Inv. note $11,000.00 endorsed S. B. secured by miscellaneous collateral enclosed, endorsed without recourse.

Don't swear but I want you to take this over and credit account of this bank if you can get it thru. The collateral is all of a slow nature but

there are a couple of mortgages there which are no doubt covering good values and will add something.

I figure that you are not banking on the C. B. & Tr. Co. endorsement anyway; you have got an overdraft and will have. You have S. B.'s guaranty and are getting his assignment on dredging profits and in general it is his personal credit to a large extent that you are considering.

As it stands, you have an unsecured overdraft, by taking this over without recourse. I'd say it is not making it any worse and needless to say will help the situation here immensely. I take it the dredging operation has been thoroly explained and if that pans out as expected, S. B. will lift all his personal stuff there and on the way down here he said he expected some substantial returns on that during February. He of course has some scattered debts to meet, but all of it won't need to be paid immediately.

I am doing this on my own initiative—not at the request or suggestion of S. B. or anyone else, and I hope you will plug your darndest on this.

Yours truly,

(Signed) W. F. BUCKHOLTZ.

1–7–21.

W. T. Triplett, Secy.

Enclosed are the following notes:

J. H. Ames.....$170.00

J. D. Bridges..... 200.00

E. F. Burnell..... 225.00

J. F. Dukes..... 167.00 Don't swear.

Earl Hughes	217.00
H. Moller	70.00
Chas. E. Perry	225.00
Curtis E. Pierson	100.00
Lambert Parrish	60.00
N. B. Strew	120.00
John Wagner	56.40
F. H. Fischer	
End. Fred S. Ross	3318.00
S. Coburn	3000.00
Total	7928.40

All endorsed by bank.

[109]

All but the last, you will observe are Ross & Fischer premium notes, with 3318 direct.

I am going to insist on Ross taking up the premium notes at maturity if they are not promptly paid, as he has other connections to raise the money and should relieve us of all he can knowing the situation. The $3318 note is a consolidation of several on which interest and $700.00 was paid on principal today and I can't say it will be paid at maturity. Ellis did this while I was out and I don't know if they agreed to clean up at maturity or not. We have no financial statement, but Mr. Rutter likely knows pretty closely and personally. I'd say they are better than Jaynes & Wardell. We want you of course to charge them up at maturities—Joke—we might have a balance by that time. I am just trying this out and see what you think of it.

You have some of Coburn stuff and statement. Ellis says this note will absolutely be paid at maturity out of his commissions on apples which surely will be in by that time. I have been over to Coburn's place. This is not bad stuff and he really is in a good conversative business and had margin of liquid capital in business. Not a gambler. Has had lots of experience in the line and has always been more or less successful altho too conservative to ever make a killing.

We will know in a day or two if the sale matter goes thru. They are going to get together tomorrow P. M. S. B. will leave for Spokane tomorrow night unless they ask that he stay altho he has given Ellis power to close deal.

Yours very truly,
(Signed) W. F. BUCKHOLTZ.

Our OD with you increased about 1000 at this end to-day, not counting any of my notes charged up as yet.

January 8, 1921.

Mr. W. F. Buckholtz,
c/o Central Bank & Trust Co.,
Yakima, Washington.

Dear Buck:

The Executive Committee talked over the $11-000.00 note of the Franc Investment Company this morning, but were not favorably inclined towards taking it. They feel that you have other paper down there which is more liquid, and which comes nearer measuring up to our standards.

We have great confidence in your ability to pick out the kind of notes we want, and will ask that you work along those lines instead of asking us to take the Franc note. I did my darndest to get it over for you, but the powers that be could not see me "for dust."

Referring to my letter in regard to liberty bond notes, it may appear to you that Mr. Barghoorn cannot borrow $22,000.00 from the bank there, and I guess in the last analysis that is right, but we talked the matter over with the Bank Examiner, and he told us to go ahead and handle it that way, namely: giving the bank there two notes, one for $20,000.00, and one for $2,000.00. They to discount the large one thru us, and keep the other one in their pouch; the large one to be secured by liberty bonds, aggregating $22,000.00.

Nothing new on the horizon to-day.

The account of the Central Bank & Trust Company is overdrawn to-night $7,434.79. Of course, we want to get this covered at the earliest possible moment. [110]

After writing you last night, I found your pencil memorandum on the makers of the various notes, and we are even better suited with the notes after seeing that than we were by merely looking at the statements.

Sincerely,

W. T. TRIPLETT,

Secretary.

W.

January 8, 1921.

Mr. W. F. Buckholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

On looking over our records I notice that a lot of apple drafts for which we have given the Central Bank & Trust Company credit are unpaid, and that in a number of cases more than two months have elapsed.

I wish you would see the makers of these drafts and ask them to give you checks for the amount so that we may clear them from our records, and enter them for collection. I do not expect your bank to put up the money, because I can understand conditions there at this time, but I do think that the people who drew the drafts should "come through."

In this connection, I wish you would instruct the tellers there not to accept any more drafts drawn payable upon arrival of car, except for collection. These arrival drafts are the bane of our existence, and the Bank Examiner is making it rather warm for us on account of the delay in collection. We had a notice to-day that one draft for $1,141.35 which has been outstanding for some time is unpaid, and that the bank is unable to get any satisfaction out of it. This is being charged back to your account, and I think you had better do likewise with your depositor. He should sell the apples or make some arrangement whereby the draft

can be taken up without any further delay.

Sincerely,

W. T. TRIPLETT,

Secretary

R.

January 9, 1921.

R. L. Rutter, President,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Rutter:

As already advised, we all feel that the withdrawals have terminated, and I am more confident to-day than ever that we can get by and liquidate our indebtedness within 90 days, provided of course that the products held here will sell at all at reasonable figures. It is not so much a matter of holding for better markets but a matter of light demand temporarily. We of course all hope to make the sale and Mr. Ellis is firmly convinced it will go thru, but not depending on that and the benefits to be derived immediately, we face the task of liquidation to the limit or bringing on as much pressure as it would be good policy to do without creating a feeling of uneasiness among depositors, whose ears might hear the talk of disgruntled borrowers. [111]

What I want if possible is for you to use your influence towards keeping the examiners away from here for say 30 days. I saw McBride in town one night and expected him in here that following day, but he didn't appear and I think he went out for Sunday. We are getting along fairly comfort-

ably; needless to say, we are busy—busy is no name for it. It would greatly inconvenience us at this time, and would delay such collection progress as we may be able to make. Then too, customers will see them at work in here and that gives another possibility of starting withdrawals, which we don't like at all. As for myself. No one has gotten curious,—I am a new man working in here in Van's place, who just left the first.

You will see my argument. The examiners would do the situation no good whatever and it has possibilities of resulting in disaster. I will greatly appreciate any influence you may have with the department.

Sincerely yours,
(Signed) W. F. BUCKHOLTZ,

Jan. 9, 1921.

W. T. Triplett, Secy.,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Trip:

Subject: Apple drafts.

I have your letter of yesterday advising that you are charging back a draft of $1,141.35 which was drawn 10–25–20. This was drawn by E. S. Small on H. L. Tonnes Co. Detroit, *Minnesota.* That all right. I will get Small in here to-morrow. Tonnes wrote Small that the apples were fine. He has them unloaded and wants more. It seems Tonnes put up bond to RR. Co. to get unloaded. He wrote Small that he would have absolutely nothing to do with the First Natl. who hold the

draft and asked Small to send his drafts to the Detroit State Bank and he would pay them. We wrote the First Natl., to turn over collection to Detroit State but it seems they won't do it; this might do it, but to make sure, I will have Small draw a sight draft on Tonnes, which we will mail direct to the Detroit State Bank for collection with instructions to wire results and if paid we will wire First National to surrender B/L. We should get this one cleaned up within six days and it cuts down the "On Arrival" stuff to $5500. If you can possibly carry this a week or ten days longer, I sure will appreciate it, but on the other hand if you get this loan matter fixed so as to give us a balance, it won't be so bad to charge us and you do what is best for both ends. You understand it will force loans on our books to that extent until returns are received. The shippers have no money on hand altho they are waiting for returns on a few items sent for collection. When the S. & E. and other banks stopt handling these on arrival drafts, it forced the shippers to check out their balances on accounts they had to pay and not getting credit on any more run them out of cash. Then apple shipments stopt, until demands for late apples comes on. There you have the situation.

On the December float which is now less than $15,000, with likely some credits since, I am not alarmed or worried over. These as you know are at sight and payments have been good. Some of this hasn't had time as yet. You might mention to Mr. Rutter that your risk on the apple drafts

in transit is not bad, not nearly as bad as it might be.

Keep writing me. I like to hear from headquarters.

Very truly yours,
(Signed) W. F. BUCHHOLTZ.

P. S.—We have already stopt giving credit for on arrival drafts. [112]

January 10, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Your account has been charged $329.89 to cover the discount on the notes aggregating $39,199.18 which we took for your account a few days ago. Enclosed is a memorandum showing the details.

Sincerely,
W. T. TRIPLETT,
Secretary.

R.
Enc.

1–10–21.

Mr. Triplett:

I couldn't find my copy of the reports on the notes I sent you as collateral anywhere in the bank this morning and thot possibly I had enclosed both copies. Will you see and if so return one copy at once?

It might have been picked up by someone and carried away or the girls may have destroyed it.

I should hate to think that someone on the outside might have gotten it and it bothers me.

The bunch of employees here don't amount to much outside of Lemon the assistant cashier or to be, and the old maid who keeps the savings books and window. I am very much disappointed in Elting. All he thinks about is getting through the day and getting out. He takes no interest in anything and during all these years has learned nothing in general. He is paying teller and on quiet days has time to do such work as reconciling accounts or other details but he don't know the first thing about starting on it. He is married and lives beyond his means, his account is overdrawn over $100.00 and he doesn't seem to be able to catch up and get it covered. I always thot he was good material but it is a case of lack of pep or ambition; doesn't even know enuf to keep his mouth shut on the outside.

Ellis allows Elting and Smith and the other teller to overdraw almost continuously; there are shortages of over $1000 for the year unfound. Van is into the bank for about $180 that we know of and in all there is such a lack of organization and efficiency that I get so disgusted that I would like to fire the whole gang out of here and get new people, all except Lemon and the old maid. Stuff lying around all over thru the night that should be locked up, bunches of uncanceled checks lying out and all such stuff as that. Two of the other four girls are good material and with a little strict discipline could be developt, but what else can you expect of

a ship without a captain. It would not be wise to make any changes just now of course and we will have to poke along but I see a way to get along with one less man and if it turns out that no sale is made and I am to remain here very long, I am going to relieve one employee or give him notice to get another job. Haven't decided on who it will be. In fact, if business doesn't pick up and deposits remain below $500,000 we could weed out two of them if the others would spruce up a little. It's a sad sad story all around and we have to make the best of it. In my opinion, Mr. Barghoorn made a good buy when he took this over, but he didn't get the right man in here. It's too bad. The big borrowers didn't need to be taken on at all. The borrowers are not depositors. We have any number of little business accounts who bring in small deposits every day. Besides that we have a lot of working people and small farmers. The Japs are mighty thrifty and successful and good depositors and there was no necessity to loan to them so much, altho I have confidence in all of the Jap loans. This bank instead of being in its present shape ought to be buying commercial paper from you and keep you busy supplying it. The force could be cut down somewhat and the institution would make very good profits even if deposits remained at $500,000, or less, in less than two years it would earn enuf to charge off everything slow. The deposits would come [113] automatically. These little concerns aren't going to run away over to other banks to make their deposits and there is lots and lots of

this little stuff around here. If you could collect in what a dozen large borrowers owe you would be on easy street, and the whole situation is due to the past nine months management. I admit that it looked as tho deposits would go over a million but that didn't justify taking on all these big borrowers. The money wouldn't burn up and could just as easily all be invested in commercial paper instead, but there's no use crying about spilt milk; there is lots of it spilt and we have to mop it up the best we can.

I tried to call you to-night but couldn't get you. Nothing in particular, only I was anxious to know what had been done on the liberty bond matter and substitution of notes as collateral; also to give you the news of our raise in deposits to-day of $13,-000.00 with $9000.00 in clearings for morning, but Bargy will be here in the morning and he will have something to tell me. Say S. B. is a prince. You did not begin to do him justice when you were talking to me. I have just begun to get acquainted with him.

(Signed) W. F. BUCHHOLTZ.

January 10, 1921.

W. T. Triplett, Sec.,
Spokane & Eastern Trust Co.,
Spokane, Washington.

Dear Sir:

To assist Mr. Blake in checking up collateral the following is now in my possession as agent for the Spokane & Eastern Trust Company:

On collateral note of J. J. Blood $450.00, par value Liberty Bonds various issues.

On the collateral note of O. A. Clark I have a real estate contract signed by Geo. Cry with an unpaid balance of $1110.00, total purchase price of the property being $4000.00.

From Ira Cardiff collateral note I hold certificate of stock, 87½ shares Washington Dehydrated Fruit Company of $8750.00. This certificate was not endorsed by Mr. Cardiff nor have we hypo and the next time that I can get in touch with Mr. Cardiff, it will be fixed up.

On the J. E. Knight collateral note I hold Pacific Dearborn Co. warehouse receipts on the two Clydesdale Trucks, together with insurance policy for $5715.00, loss payable to Central Bank & Trust Company.

On the Shields-Livengood rediscounted note of $2500.00, I hold their own warehouse receipt on a National Sextet Touring Car, in their Seattle warehouse, wholesale cost $4200.00; copy of the receipt, which is in reality a trust receipt, is enclosed. Mr. Ellis says that there is no doubt but what this car is covered by insurance, but the policy is not in our possession. I will try to get this from the manager here as early as possible.

Enclosed is hypo signed by Central Bank & Trust Co., in connection with our note to be secured by customers notes; I neglected to enclose it when I sent the notes.

Yours truly,

(Signed) W. F. BUCHHOLTZ.

B/H. [114]

January 10, 1921.

W. T. Triplett, Sec.,
Spokane & Eastern Trust Co.,
Spokane, Washington.

Dear Sir:

Please send me the following notes, sent you in the batch of $40,890.21, to be held as collateral; after your collateral department has made his records:

B. L. Blood	$ 450.00
Farmers Produce Co.	2861.50
P. C. Foster	200.00
Jose E. Frisque	300.00
R. A. Gray	1000.00
H. Z. Honda	3000.00
Shields-Livengood Motor Co.	2500.00
N. D. Warwick	1654.49
Conrad Weiss	1486.39
Wapato Construction Co.	2500.00

I would like the original notes here for collection in case the borrowers should happen in.

Thanking you, I remain,

Yours very truly,
W. F. BUCHHOLTZ,
(Signed) W. F. BUCHHOLTZ.

B/H.

1–10–21.

W. T. Triplett, Secy.,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Trip:

We had a nice day to-day with a gain of $13,000 in deposits which includes a cashiers check of

$5000 which will be in in about a week. Our remittance to Spokane totaled $17,907 of which $3169 is sight apple drafts, balance regular bank checks.

Collected only a little small stuff which didn't amount to anything and Ellis took E. S. Small's note temporarily for $5250 to take up some old charged back apple drafts which have been laying around here for some time and then credited back and carried as cash items for another 10 days or so. It is hoped that we will get some credits on some of the drafts and others he has to arrange to re-sell. I don't think Small could get the money elsewhere, altho Ellis didn't go into that with him. This bank has carried him and he does all his business here. Of late his balances haven't been steady altho he is still selling stuff occasionally and now and then makes a good deposit. Has lots of fruit and money due him on shipments tied up and when it all gets in Ellis thinks he can easily clean up here.

The S. & E. account hasn't been reconciled for December and I haven't had time to get at it, but if nobody gets to it to-morrow I am going to try to do it myself. We don't know how we stand closely. We should have a credit balance without the loan for a little bit anyway. As stated, we got Small to give us sight draft on that Tonnes car which we sent direct and charged to sundry banks, credited S. & E.

I am not sending any notes to-night, and in fact am going to quit early for a change. I am won-

dering what you thot about the notes I sent, but will hear from you to-morrow.

Sincerely yours,

(Signed) W. F. BUCHHOLTZ. [115]

January 11, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

I am enclosing a list of the fruit drafts outstanding. You will notice that some of them are a hundred years old, more or less. They are the bane of our existence, and while Ellis and some others may blame us for not taking them, there was absolutely no way under the sun we could use them, and we are sorry we did not clamp down the lid sooner than we did. Four or five of those should be gotten out of the way without delay, and I am going to ask you to do a little work looking toward that end.

If the Associated Fruit Company does not want to pay its drafts, then it is up to the people at that end of the line to take them up and handle for collection. Friend Bank Examiner, who has been with us for about a week, certainly is laying on us hard for permitting you to let them stand out so long.

Sincerely,

W. T. TRIPLETT,
Secretary.

R.

1-11-21.

W. T. Triplett, Sec'y,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Trip:

Kindly charge our account with the L. W. Adams $400.00 rediscount reduced and renewed for $350—30 days—history enclosed.

I am enclosing the new $350.00 note for rediscount again, together with new note of C. A. Rhoades for $900.00, for which if agreeable kindly credit our account. New statement on Rhodes enclosed.

As per your letter of the 10th, we are crediting your *your* account with $329.89 to cover discounts on the $39,199.18 batch. Our remittance to you to-day again was good and taking in consideration the float of our drafts, we should have a credit balance. Lemon and Smith are working on the reconcilement to-day and we hope to find out how we stand by to-morrow.

Enclosed is statement 1—1—21 of G. E. Friesen whose note you hold as rediscount for $2000.00 the total amount he owes this bank at this time. See information attached.

Yours sincerely,
(Signed) W. F. BUCHHOLTZ.

P. S.—Mr. Barghoorn arrived this P. M. and tells me he signed the $20,000 liberty bond note and we are making the corresponding entry. I have as yet no answer on the 40 odd thousand collateral

notes sent you, and whether you will see fit to put thru a credit immediately.

1-11-21.

J. L. Campbell, Comptroller,
S. & E. Tr. Co., Spokane, Wn.

Dear Mr. Campbell:

I believe the S. & E. is relieved of my salary from the day I left and you [116] likely have a small credit due on the 15th for the first few days of January and whatever it amounts to. Wish you would credit my check account on that day and mail slip of it to Mrs. W. F. Buckholtz at E. 20 5th Ave. Spokane in order that friend wife may know the amount.

Hoping that everything is progressing to your satisfaction.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

P. S.—We have lots of work and things to think about.

1-11-21.

Dear Mr. Triplett:

I happened to run on to your letter of 1—3—21 asking for statements on C. H. Ashman and Richard Frederickson. Neither of these people have been in and the following is the best I can give you at present.

C. H. Ashman is a tenant of S. S. Busch on one of his irrigated tracts. The note is also signed by Busch which adds strength. Ashman has a small equity in a piece of land, which together with mis-

cellaneous chattels likely would show a net worth of $3000.00. They have on this place about $2000.00 worth of clover seed out of which the note is to be paid. The clover seed market is dull at present as there is little demand for it at this time of the year. We don't know if insured or not, but as soon as I can get one of them in, will send you further details.

Richard Frederickson owes this bank $2333.40 all of which is rediscounted with you and due 2—6—21. He has an equity in a place of about $3000.00. This loan is secured by cha. mtg. on some equipment, together with his 1920 crop which consists of 100 tons of hay and 40 tons of spuds. Yesterday some hay was loaded out at $17. A dealer told me some went out at $18 last week. The lowest sold to my knowledge was $14. Figuring the hay at $14 and the spuds at $20.00—(I don't know or haven't heard what spuds might sell for at this time) there would be hardly enuf to clean up, but there are good chances of getting better than $14.00 on the hay. I am writing Frederickson to-day to come in here and we will see what we can do about selling the hay immediately, and will advise you of any developments.

Sincerely yours,

(Signed) W. F. BUCHHOLTZ.

January 12, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Thank you for your letter of January 10 enclosing history sheet on H. C. Davis. The old boy is one of those hardboiled fellows who believes that the only province of a bank is to lend money; that as long as a man is good there is no use asking him to pay up; and that deposits in connection with a loan are out of the question, for a man would not borrow if he had any money to keep on deposit.

He is largely responsible for getting a bunch of loans in the pouch signed by persons who carry no balances with the bank. I think he is a big drawback, but on the other hand you need him in this crisis and it would not be well to press him too hard. I think you ought to make him understand he is not to be a continuous borrower, but is to pay up whenever he sells any stock or any [117] produce, and borrow at other seasons.

He is just as you described him, a first class politician with a lot of influence, and particularly in the livestock lines.

Sincerely,
W. T. TRIPLETT,
Secretary.

R.

January 12, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

You have the C. A. Rhoades matter sized up exactly right. Mr. Rutter thinks that you handled it in fine shape. He is not the kind of a man to press for payment. He owes you such a small amount in comparison with what he received for his products, that you would be foolish to go out and force collection.

On the other hand, if his produce was only worth $5,000 and he owed that amount you should go out and put on whatever pressure is needed to secure liquidation. The kind of people you should get after are those who are continuous borrowers, and who will have nothing left to deposit after their loans are paid. The chances are they will be applicants for new money within a very short time, and the only way to circumvent their requests is to ask them to pay up and go elsewhere.

Regarding Ashman and Frederickson—I think you had better watch them carefully and see that you get returns if the crop is sold. Otherwise, they will be inclined to pay other people, use the money for expenses, and do everything else other than pay the bank.

It is entirely satisfactory to us to handle the L. W. Adams renewal and C. A. Rhoades note. Your account has been credited $1,237.70 to cover

the new notes, and charged $399.77 to retire the old note of Adams.

We are pleased to learn that things have quieted down and that deposits are running along in the regular way. I am not so sure that the withdrawals are all the result of uneasiness on the part of the depositors. Nearly all Spokane banks have had some decrease in deposits since the first of the year, due to the fact that a good many people who have savings deposits have bought bonds or moved away, and they were just leaving the money here until interest was credited up. Our own deposits have shrunk a whole lot since you left, and we are congratulating ourselves that they have not slipped even more.

Sincerely,

W. T. TRIPLETT,

Secretary.

R.

1–12–21.

Mr. Triplett:

Deposits to-day down about $3000.00. Regular run of stuff. Nothing in the way of withdrawals of accounts that amounts to anything. Just a day when nothing large comes in.

Cash collections of notes net, only $600.00. [118]

Everybody appears to be calm, business quiet and nothing exciting occurred: Few cars of hay being loaded out every day but demand weak. Geo. Cyr made an appointment to see me to-morrow. He is a borrower on haps, you have him. In the mean-

time he is going to feel around on the market a little. Will advise you results of our conference tomorrow.

W. F. BUCHHOLTZ.
(Signed) W. F. B.

P. S. —How is Wienss getting along? Selling any wheat? Is the Omah situation doing anything?

1–12–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Trip:

Thanks for informing me as to the telephone rates after midnight. I didn't know this and it may be of considerable use to me.

If you should be having a night session at the bank or be there after midnight and have anything of importance to tell me about, you might call me Room 553 Commercial Hotel and I can talk where it is quiet and not a lot of people around to hear me. It is usually about 12:15 before I get to my room—I don't mean that I am usually in somebody else's room until then. I don't want you to misconstrue my meaning, that's all, as I am usually down at the bank until 11:45 and then mail my stuff on the night train.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

1–13–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Trip:

In regard to financial statement from Ross & Fischer: Ross just got back from Ellensburg and I saw him in the lobby of the Commercial this evening.

He says they are closing up their last year's business and in a few days will have the desired statement and I will forward you a copy when I get, *keeping after them* in the meantime.

Ross also says they expect a check of $5000.00 in a few days and it is quite possible that they will take up the note at that time, realizing the situation here. I also had a talk with him about taking up past due premium notes and made favorable progress on that. Enclosed is copy of J. D. Bridges statement of to-day. You hold his for $200.00 end R. & F.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

1–13–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

Enclosed is renewal of Geo. L. Cyr hop loan for $5250.00 for 60 days, to [119] replace two notes rediscounted with you aggregating $5200.00.

The enclosed history sheet and new statement tell the story. This might be prepaid as Cyr is anxious to sell as early as possible but I made it 60 days as it might take that long for a market to develop.

As per our conversation, I could have split this up, making one note absolutely secured with large margin and the other not, but you know how it is with us at this time. It's like an old girl at 60—what is the use?

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

P. S.—Received credit memo for L. W. Adams renewal and C. A. Rhodes $900, for which thanks. I am glad my action on these met with approval. One of the Cyr notes was here for collection; the other has not arrived. Please cancel and send it if it's not already on the way.

January 14, 1921.

Mr. F. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Your letter of January 12 in regard to the Small drafts is received, and we are not altogether satisfied with the situation. It seems to us that in view of the length of time these drafts have been outstanding, he ought to sell the apples on the open market if the Associated Fruit Company is not going to take them up, and let us clean the slate.

In lieu of that it will be satisfactory to us if you can scrape up enough rediscounts to take the place

of these drafts and let us enter them for collection. We don't want them outstanding much longer. We all feel that there is going to be a good sized loss on Small, and the sooner we get things in shape the better. The apple market, like everything else is slumping, and the longer you wait the greater the loss will be. In our experience the man who gets in first and secures his money comes out on top, and the man who dilly-dallys along comes out at the small end of the horn.

That has been the trouble over there in Yakima. Instead of going after their borrowers last September as per our suggestion, they were too much inclined to listen to the borrowers' tale of woe and his optimistic views as to higher prices, instead of using good judgment.

Sincerely,
W. T. TRIPLETT,
Secretary.

R.

January 14, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Whose receipt does the County Treasurer hold for the Liberty Bonds which were forwarded for conversion? If it is issued by the government or you have a form of receipt from the Federal Reserve bank for it, we see no reason why we should not trade you $10,000 worth of Liberty Bonds for your receipt, and hold the latter until returns are

received, provided the bank will give us a written agreement to turn the bonds over to us as soon as they arrive.

Sincerely,
W. T. TRIPLETT,
Secretary. [120]

R.

January 14, 1921.

Mr. W. F. Buchholtz,
Care Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

To-morrow your account will be credited $40, being your salary for the first six days of January and a duplicate of the deposit will be sent to Mrs. Buchholtz, as requested.

We have had the examiners with us ever since you left, you no doubt know, and we seem to have enough work ourselves to keep us busy. I haven't heard of anyone looking around for something to do for some few days.

Sincerely,
J. L. CAMPBELL,
Comptroller.

JLC: MS.

1–14–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Washington.

Dear Mr. Triplett:

Nothing new to report to-day in particular. We had a regular day although our deposits dropt

about $8000.00. This is not a large fluctuation for the volume we handle, but the trouble is there are more downs and ups. Didn't collect anything to speak of to-day although got some statements and made a few renewals.

Woodcock will likely pay us $1500.00 to-morrow or Monday, which he said he would. This however, is full payment of a note held in Seattle. You can put considerable confidence in the paper with his name on it, of which you have $12,000. His turn over of cash is good and he deposits bunches of checks which would make you think he was in some business in town. He did not put all his assets in his statement and he is believed to be worth a half a million and not all his assets are of a slow nature either; in fact, we could get every cent on the paper he is on as he can get it elsewhere anytime, but you see he is not only on the board here but is one of the substantial fellows in the bunch of prospective purchasers. In spite of this, you can be reasonable sure to get some money at maturity from him; in fact Ellis says he will pay all of it.

You mentioned the Grangers Whse. Co. $6000.00. I agree with you that the load is too heavy but likely you were under the impression that this business is conducted in Granger which is not the case. It is in the same block that the bank is, and consists of general mdse. and produce business, owned and operated by a bunch of farmers.

Keep writing me. It's great to hear from home. It strengthens my morale and it is indeed a pleas-

ure to pause for a moment thru the day and open and read them. I am going to use you all I can in this work, and knowing that you have plenty of other matters to look after, I appreciate the time you give me.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ. [121]

1–14–21.

J. L. Campbell, Comptroller,
Spokane & Eastern Trust Co.,
Spokane, Wn.

Dear Mr. Campbell:

Please send us a statement of our account with you with vouchers up to date, and from now on have them sent twice a month, on the 15th and last.

Two of the boys have been working on our reconcilement of account for several days and as yet not reached a balance. We hope to get this completed soon and will send you return sheet. Unfortunately a great bunch of stuff consisting of charged-back apple drafts, costs on these, wires, collection and exchange charges, etc., etc., have run on without attention for so long that it nearly necessitates the employment of an expert to ferret out all the differences.

Thanking you, and with personal regards,

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

P. S.—Since writing the above I have watched the boys work on it for a little and I see they have a lot of December stuff to check up as yet. Until

further notice, I wish you would have someone enclose a slip of our balance each night until we get it straight. I can then estimate outstanding drafts and other large items and get some idea as to how we stand from day to day.

January 15, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Referring to your letter of January 13—I am not altogether sanguine about the Rhoades matter. The price of apples is something yet to be determined. My thought in writing you was that if the value of the apples was very little more than the loan, there was not much use in taking chances and mincing words; but if the price of the apples exceeded the loan several times over, as it apparently did, you would have been foolish to go after the loan.

The trouble with apple dealers, hop dealers, and any other dealers that we know anything about, is that they are hoping against hope that the price is going to increase or continue where it is. They are merely kidding themselves. [122] The price of all products is on the down grade. After the Civil War values declined steadily for thirty years. You know what happened to what this year. The apple men have been fortunate so far in that the price has not slumped proportionately as much as other products, but our friends in the Wenatchee country tell us the market has quieted down

to a whisper, and that it is next to impossible to get a bid on any amount of apples. This is the beginning of the slump. A banker should advise his customers to sell their products and get out from under the load.

This goes for Cyr as well as anyone else, although in Cyr's case you want to get all you can out of his crop. At the same time, you don't want to let the market slide out from under him. We have renewed the Cyr note, but shall expect it paid at the next maturity.

I think you can understand our position in the matter, and while it may appear a bit arbitrary to you, these things will hang on for ages if somebody does not put on the pressure that is necessary to get results. The trouble with all of us is (and this goes for me as well as anyone else) when we get among the farmers and see the actual produce, we are inclined to take their viewpoint because we can see the stuff and know something of the value. On the other hand, conditions are entirely different this year than ever before. We are on a constantly declining market from which there is little prospect or hope of recovery for some time. The tight money market alone would tend to hold prices down if no other feature entered into it. There isn't enough idle money in the world to buy any great amount of products and all purchases are on a week to week or hand to mouth basis. The butcher, the baker, the candlestick maker can't see over a week or ten days in advance. Consequently they don't lay in the supply of goods they formerly

did and are buying in driblets. You know what that means. When any of your borrowers begin to talk about holding for higher prices it would be just as well to turn a deaf ear to their appeals.

As regards H. D. Smith, it is all right for him to talk about relieving you of his loans in case you get uneasy, but unless conditions in Yakima are entirely different from what they are any place else, he will not find it so easy to make good on his promise. Apparently he is sound and in good shape, but when a man talks about going across the street and borrowing money to pay another bank he does not know what he is talking about in these days. All the banks in Spokane have had attractive business put up to them if they would lend money to pay off some other bank, but when it came to a show down they did not get the money.

We thank you very much for the $2,500 he paid and for letting Herb continue to carry his part of the load.

Sincerely,
W. T. TRIPLETT,
Secretary.

R.
Enc.

January 15, 1921.

Mr. W. F. Buchholtz,
Care Central Bank & Trust Company,
Yakima, Washington.

My Dear Buck:

Enclosed you will find statement of account of the Central Bank & Trust Company, as of the close

of business January 14, and as requested, we have placed your name on our mailing list and hereafter you will receive a statement of your account on the fifteenth as well as on the thirty-first. I have also asked Miss Cannon to furnish me daily with a memorandum of your balance and I will endeavor to see that you get it all in due course.

You certainly ran up against a mess all right but after you once get it straightened out and know where you are, it won't be so bad. The party who [123] was in charge of the reconciling end of it I am sure cannot have given it much time or else it would never have been in such shape.

Sincerely,
J. L. CAMPBELL,
Comptroller.

JLC: MS.

1–15–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

I note that Chief Snider is still marking the collection slips on rediscounts sent me for collection as follows:

"Will charge your account at maturity."

You advised me that this would not be done, and I hope it will not be. I am very anxious to keep our account intact and if rediscounts are charged up in this way, it just simply can't be done as it requires time to get these items renewed or collected.

If O. K. be sure and see that Chief doesn't do it.

Yours very truly,

Sincerely,

W. F. BUCHHOLTZ.

(Signed) W. F. BUCHHOLTZ.

P. S.—Mr. Barghoorn left for Spokane this P. M. and he can give you late information. WFB.

January 17, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Enclosed is a copy of our entry in connection with the H. D. Smith payment of $2,500.

I do not know whether you adjusted the interest or not, but this will give you an idea as to what was done.

Sincerely,
W. T. TRIPLETT,
Secretary.

R.
Enc.

1–17–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

Collateral notes only.

Enclosed find renewals as follows: (Original notes.)

B. L. Blood $400.00, secured by U. S. bonds par

$450.00; note due in 30 days with authority to sell at maturity unless taken up by them. [124]

H. Z. Honda $3000.00. Chattel mortgage hotel furnishings.

The P. C. Foster $200.00 note held by you as collateral was collected in cash today. I have not made entry to give you this and with the $50.00 reduction on Blood cuts your total collateral down to $29,966.72 as it stands, but I have a couple more entries to make on collateral notes, people in after hours and tomorrow will send you something more to cover. It is necessary that we substitute other paper for collateral notes collected at present which I trust is agreeable.

On the above B. L. Blood note, I am retaining $450.00 in liberty bonds for you. Blood begged so hard and assured me that he had money enuf coming to pay this note in full and keep his bonds, that I allowed him another 30 days. If he doesn't come thru by maturity I will forward the bonds to you for sale. He expects to get some money in about ten days, but I think it's bunk and if he doesn't, it is understood that we sell the bonds without further negotiations.

Yours truly,
W. F. BUCHHOLTZ,
(Signed) W. F. BUCHHOLTZ.

P. S.—Honda couldn't pay anything more than interest this time but assured me that by next maturity would make substantial payment. It is possible that he is helping some of his Jap friends and I am going to watch his account.

1–17–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wn.

In General.

Dear Mr. Triplett:

Thank you for your general letter of the 15th.

About that fellow Rhodes, I agree with you. I'd sell enuf now to clean up even tho I had $10,000.00 worth of apples and owed only $900.00, but with Rhodes it is different than many others. His stuff is 75% extra fancy, in good shape and size. He told me he could get $2.00 but on account of having such good stuff felt he could afford to wait a little, especially since his indebtedness was light. But, you take some of the other fellows who have 5 tier apples and C grades and poorer, they haven't any offer at all for any amount. These are the birds that I think should take what they can get as early as possible; in fact every borrower whose ratio does not show a large margin and owes considerable, should not wait one moment.

You take the hop fellows. Right now there is practically no bid for hops. Such brokers as have connections for handling are on the lookout for hard-up hop growers and want to buy at 25¢ and speculate, but from what I can learn from a number of sources, it is reasonable to expect a market in 30 to 60 days. The First National has some hop paper; they don't expect anything on it until March and by the way, they are a long ways from being on easy street themselves with steadily de-

creasing deposits, altho they hope to get a good boost in March. I haven't bumped into many fellows as yet who are standing us off on the idea of holding for better markets, but in many cases there is hardly a market of any kind on some things. It is true that a little stuff of all kinds is being shipt out right along, but the volume is sickening, and we are all hoping that the apples will clear out during the next 60 days. Altho I expect to keep pounding along getting what I can, I don't expect to do any great volume of liquidating until February or March. I am figuring on from $100,000 to $150,000 out of hops and apples during the next 90 days. If these two items don't move, we are going to have some mighty hard sledding and it won't be this bank alone.

With reference to H. D. Smith with whom I am getting pretty well acquainted, as [125] he lives at the hotel, he did not say how he would pay if we called him. I think he would sell. You know he is a buyer for Cohen & Co. of Chicago, has some capital of his own, and this business is on his own account, and I am inclined to think he knows where he can sell his stuff and what he can get. Altho, I admit this is speculation, he is not the rank kind that Eddie Small is, and doesn't load up with more than his capital will comfortably handle. He told me that he could sell at 20¢ profit over all costs on what he has in storage, but that it was too early to sell the quality of stuff he held. He says the outlook on small and inferior stuff is not encouraging, but that he was in close touch with the

Chicago people from whom he gets night letters every day and that he wasn't losing any sleep as far as his personal business was concerned. If his account didn't amount to anything, I'd sure put on the pressure but he always has a balance which usually commensurates with his borrowings, and if any items come back the money is there to cover, and in fact I might add that it is a pleasure to transact business with him, and I am not doubting that by the end of 60 days will see him cleaned up, which is a lot more than I can say of some others.

I don't want you to feel that I am drifting off into an alley of thot which might not do this situation the most good and I agree with you to the letter on the several subjects touched on, but what did the wheat fellows do when there was absolutely no bid whatever for a short period. There was nothing to do but wait until buyers did come back on the market. Moss of Fairfield told me that for a week or so they couldn't sell wheat for 50¢ a bushel; that there was no bid at all and they had to wait. The situations of some commodities is just that. In fact I have met with little stubborn resistance on this argument on the part of growers. If they have any stuff to sell, they will sell even tho the price is down, but they want cash. The buyers and brokers are loaded to the brim with stuff; the banks are all holding them down and until the crest runs off a little, cash bids will be weak and few for the commodities. Many of the growers are pestering the life out of fruit dealers trying to get money

due them on stuff already sold. We have some of these growers who have accounts receivable. Many of the dealers are responsible and will pay when the peak begins to simmer down, but if they can't borrow from the banks they have to wait for returns and there is nothing to do but tell the growers to go to their banks and tell them these conditions, and the banks can do nothing but carry them along.

We are still getting in a little bit of money each day on our loans, but it is sickening the way things drag on.

Our statement on the 14th showed about $6000 balance, and I note that you charged the Barney note of $3500 along with some others to our account. Our floating drafts were about $12,000 on that day and altho our remittance to-day will help about $8000 we will be in the red again unless it keeps up good. We gained $14,000 in deposits to-day, $6000.00 of which was in currency, which of course is refreshing, but for several days past it went the other way strong, our low water mark in deposits being $440,000, Saturday, to-day, up to $454,000.00 again. The deposit end of the business is all quite regular at present and it is reasonable to expect that they will at least stay above $425,000.00 unless we can get more county funds which will likely be towards the end of February or first part of March. At that time, if we have the collateral, it is possible that we might get $50,000.00 additional in county funds. If we should get something of a raise or temporary spurt by March 1st from the general run of business, together with

what liquidation may be made by that time, I hope we will have a little breathing spell for a few minutes from the reserve standpoint. Our actual cash reserve when you get down to the bottom of it has been running from 6 to 10%; in fact scarcely more than the cash on hand in the bank, as actual collected balances are usually an unknown animal around here usually offset by what our books show as overdraft with you, the balance of due from sundry banks consisting of uncredited apple drafts gone hay-wire. That E. S. Small business is enuf to drive a fellow to drink. By the way, I misinformed you as to his indebtedness here. He is on the books as a [126] borrower at this time of $16,250 instead of $20,250. The girl posted a note to his account in error. The *the* $16,250 add overdraft of $1900.00, stranded fruit drafts which will come back on us of $5000.00 and you have a total of about $23,000.00 Small actually has a bunch of stuff consigned East trying his best to sell it and take a loss on part, but to date hasn't gotten any money on it, and the come-backs of the apple drafts, wherever there is a chance, we are arranging to file R. R. claims in our name. Just how he will come out, we don't know at this time. Small was in this P. M. and wanted to go over stuff with me, but I had four borrowers waiting to see me then and he had to get back to his business. I had a real day's work to-day; from ten o'clock on I was taking statements and figuring with borrowers steadily, and when I got to the end of the bunch, I looked at the clock and it was quarter to four and

felt pangs of hunger as I eat a light breakfast, so went out and had a lunch; worked a couple of hours more and then went to the Commercial and had a good feed to the tune of $1.65 and Tales of Hoffman.

Ellis did some work to-night which will help. He wrote up a large pile of letters on past dues, asking them to come in. I hope it brings results. It's quarter to 12 and I have to beat it and get my stuff in the mail. I promised Mr. Barghoorn I'd keep him advised as to how things were going. No time to-night and if you show him this it will give him some idea.

Sincerely yours,
W. F. BUCHHOLTZ.
(Signed) W. F. BUCHHOLTZ.

January 18, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Referring to your letter of January 15—we have instructed Mr. Snyder to make no charge against the Central Bank without authority from you. However, in some respects the system is all wrong.

You ought to arrange it so that there would be a certain amount of new paper coming in to take the place of the old paper as it matures, so that we would not be under the necessity of waiting for you to obtain renewals—something which is at times rather difficult.

Unless a system of that kind can be worked out, your humble servant and a lot of the other employees of the bank will be working overtime trying to get the past due notes in shape, and to keep away from the wrath of the Bank Examiner.

Sincerely,

W. T. TRIPLETT,
Secretary.

R.

1–18–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.
In General.

Dear Mr. Triplett:

Deposits held about even and collected in a little better than $2000.00. Am scheming and figuring on how and what to send you as I know if we have any balance there, it represents floating drafts as our books show quite an overdraft, but will be sending you something before the week is up.

Well, it became necessary to have a confidential talk with Ellis to-night in an endeavor to ascertain his ideas and as to how seriously he took my presence and position. You understand things have gone pretty smooth between us for a while until to-day or this evening. It was like this: Mr. Barghoorn mentioned to us that the Wapato Construction Co. would get $3000.00 in a day [127] or two; in fact I mentioned it in one of my letters. This didn't come promptly and altho I was on the lookout for it, I failed to notice that the deposit was made yesterday, the 17th. It was an under-

standing with the bank that when Wells got this payment, the bank was to get part of it; in fact the bulk of it. Wells agreed to that, and Mr. Barghoorn wanted us to see that we did get some of it. Ellis knew the deposit was made and saw Wells make it, so as soon as I discovered it to-day, I jumped him about it since Wells had already checked it down to $2100.00 by close of business to-night and nothing on our notes. Ellis said Wells didn't say anything about his notes (both past due) but mentioned he would be in to see him to-night. This was before six. Right then, I plainly told Ellis that if Wells didn't show up to-night as agreed, I would charge his account with $1500.00 or half of the deposit and endorse it on his note, advising him of it and informing him that we would not tolerate his overdrafts—his account was overdrawn before the $3000.00 was deposited. Ellis didn't say much to that, but agreed that Wells was perfectly willing we should have a part of the $3000.00. So far so good. Well to-night about 8 Wells sure enuf showed up. Wells being well acquainted in Tacoma, the subject drifted to the Scan. Am. Bank and the people in it and the causes, etc., which lasted about half an hour or so and then drifted into his work and the collection of what was due him. Finally it appeared Wells was about to go and thinking that nothing would be done, I mentioned that since he was here, why not get his notes in shape. Wells said good. He would rather do it now than tomorrow when he would be busy. I dug up the two notes 2500 and 4000, both past due and turned them

over to Ellis. By the time I got the notes, Wells had made out a check in blank for $2000.00, which was lying on Ellis's desk, and I at once thot it was payment on notes. I didn't pay any more attention to the dealings and went about something else. When Wells had gone, I found that both notes were renewed just as they were with interest paid only. I inquired of Ellis how it was and what the $2000.00 check was for. Well, the check was just to show his honesty and desire to protect the bank inasmuch as his balance would always be in our charge and if we saw fit, we could draw it any time; in fact kept his account as security if we wanted it. Naturally, I began to get warm under the collar and asked him to give me an explanation as to why he did this after Mr. Barghoorn had mentioned the matter, and I had emphatically told him a few hours before that we were going to get $1500.00 of that $3000.00. I would have said nothing had it been $1000 at least. He hummed and hawed and said that Wells would have enuf in 15 to 20 days to clean up the entire $6500.00, and that he thot when I mentioned to get the notes in shape that it was agreeable to me to renew them and if it wasn't why didn't I speak up and talk to Wells. Of course I had to explain that in any case where he was already negotiating with a customer to the point or granting renewals that it was not my place to horn in and say no we won't do this or that, and when he already knew what the program was, it would be much more diplomatic for him to handle the customer and in the end, I didn't want to hu-

miliate him by riding over him in the presence of a customer; that that wouldn't do and I began to get warmer and plainly told him that I had been thinking that he and I could work together and that he wouldn't go ahead and do things without my knowing it or against my wishes; that in this case he didn't even tell me that Wells had made the deposit yesterday when he knew it and then in the end deliberately did the opposite of the policy and plans I had laid out to his knowledge and even at the request of Mr. Barghoorn. He came back with the statement that I shouldn't criticise; that there had been piles of criticism thrown at him, etc., and for me to cite one instance other than this that he had not followed out my ideas. I replied that I was not driving at anything else he had done, or had not done, but was talking about this deal to-night and what I wanted to know and get at was to ascertain whether or not he was going to take my plans and policies seriously or not, and if he wasn't I wanted to know it right away. He kept dodging and squirming around the issue and we weren't getting anywhere. Finally I asked him if Wells had argued that he absolutely needed every dollar of it to finish his job and that it would be impossible for him to spare any of it. (That is the funny part of it.) He said no, he didn't; in fact, he mentioned that he wasn't going to use a dollar more than he had to and expected to keep a balance of over $1000.00 on hand until he got his estimate the 26th—which I know he won't do. Checks came in thick to-day [128] and he will write out a lot more to-morrow and the $3000.00

will be scattered in no time. I failed to get the idea of leaving the $2000.00 check which Ellis said he did voluntarily, but that it wasn't understood to go on his notes. Well, after jangling a while he said Wells was coming in again to-morrow and he would ask him to give him a check of $1000.00 to apply on his notes and ask me if that would be satisfactory. I said "Ellis, if you have granted him renewals on all of it, would it be good policy to change your mind over night and the next day ask him to pay $1000.00?" Well he thot he could get by with it smoothly and that anything was alright with Wells.

Now what do you know about such a case? I have him sized up as a banker who lets his borrowers manage their own credits. Of course Mr. Barghoorn's strict instructions to make no loans whatever has held him down and it is a mighty lucky thing that it came to that when it did. We have had enuf forced on to us since.

Knowing that it is easy to criticise and tear down a fellow when he's in a jackpot, I have tried to look at the man's good qualities and exaggerate the factor that markets went against him, together with shrinkages in deposits, when it wasn't expected, and all those things, but right now I am firmly convinced that he has no backbone or there is something radically wrong and the man not only uses poor judgment but is dangerous in a bank. That's pretty strong and someone might say that of me before I get thru with my banking career, but if it ever comes to that and several bankers in high

positions who have made a success will say that, including the banking department, I think I will admit that I am a failure in the line and if my presence is desired I will still stay and do all I can. With him it is different. He still thinks that he knows what he is doing and made the statement to me to-night that their condition is the result of circumstances over which they had no control and that he Ellis had done everything possible to better things and that he didn't think anyone else could have done more than he has done, and everything you bring up, he has an alibi for, and says the criticism is merely prejudice, etc.

I said "Ellis, you are all wrong. You have 10 borrowers owing you an aggregate of over $100,000.00 right to-day and you don't need a single one of them." To that he replied that it was business of their local directors and stockholder and approved by the directors and that Millichamp had brot in the Wapato Const. Co. account and this and that. I replied to h–ll with your local directors and stockholders; instead of being a help to you, they are a bunch of heavy millstones, every last one of them. They are not bankers and don't see the situation and it's up to the cashier of a bank like this to tell them at the board meeting what is what and that you can't carry the loads they are shoving on to you, and I haven't seen one slight effort on the part of a single one of them to relieve you of what you are carrying for them. There is Millichamp $13,000. Woodcock $12,000. Ross & Fischer $5000.00. Wapato Const. Co. $6500.00 for almost a year—

brot in by Millichamp, who thinks he did something for the bank, and a lot of other heavy borrowers.

As far as Ellis is concerned, I have made up my mind that you and Mr. Rutter have him sized up about right. If anything your opinions are too good and you have too high a regard for his ability if anything.

To end our argument and conversation, we both agreed that it was desirable that he stay on the job for effect, and I added that I hoped strongly that the prospective purchasers would buy the institution and bring enuf deposits to take up all indebtedness and clean up with the S. & E. and stay out, and that as the new people had expressed a desire to have him remain with them, I wished him and the bank every possible success in the world, but in the meantime, while I was here, there was no sense in the bank paying my salary and heavy expense if he was going to pull any more stunts over me like this one; that I had lots of other work that I could do and didn't need this job as far as I was concerned, but that I had been sent here to help liquidate and that results were expected of me and I wouldn't stay without [129] his recognition and co-operation. I had ripped him up pretty severely, keeping in mind that we need him still but feeling that he has nothing in sight and Lord only knows how bad he wants to stay and make some people think he knows something. He finally came part way, appreciated that what argument we had had in the past had taken place when we were strictly

alone and the fact that I hadn't once jumped him in the presence of any of the help or customers and added that he would see that nothing of importance was done over my head again and was willing to work in harmony with me and tried his best to smooth things over and we parted in good spirits and I think I accomplished something thru our long argument. Whether he takes it seriously or not, I don't know. I wish someone would analyze this fellow for me. It's beyond me. He is different from any human being I have ever chanced to work with. I have made up my mind that I need to watch him closely each day, or the first thing I know, he will let another $1000.00 get away.

Well, it's me for bed. I am merely writing you these things occasionally to put you in position to make recommendations and suggestions. You have had lots of training and experience in discipline while I have not; at least I have accomplished nothing in that line.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

1–18–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

I want to get you some notes in shape for rediscount to cover the O. D. just as fast as I can get the charged-up ones renewed or collected, and complete

information to cover them. This goes slow however. I have seen Barney on the $3500 as yet.

Enclosed are two little ones as follows:

W. G. Linse $300.00 due 3–18–21

Jos. E. Frisque $200.00 due 4–17–21

the latter secured by U. S. Liberty bonds aggregating $250.00 which are enclosed. Kindly have Mr. Blake attend to conversion of the bonds.

Both of these notes will be paid in cash at maturity; statements enclosed.

I wish I had about $20,000.00 of stuff like this. Kindly credit if acceptable and advise details.

Yours very truly,

W. F. BUCHHOLTZ.

(Signed) W. F. BUCHHOLTZ.

Registered.

P. S.—Don't laugh. Every little helps, you know.

January 19, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Prepare yourself for a shock. Day after tomorrow your account will be charged with the six Associated Fruit Company drafts which have been outstanding for so long. The enclosed telegram is the answer.

We are hoping you are fortunate in getting the old boy to dig up, but are [130] not entirely sanguine over the matter.

Sincerely,
W. T. TRIPLETT,
Vice-President.

R.

January 19th, 1921.

W. T. Triplett, Sec.,
Spokane & Eastern Trust Co.,
Spokane, Washington.

Dear Sir:

Enclosed is original note of E. F. Burrill for $600.00, together with late financial statement, from which you will observe will not be collected until 1921 crops are realized. The note is secured by chattel mortgage held by this bank, covering all 1921 crops on ten acres of orchard and alfalfa, together with one Chevrolet touring car, two farm horses, two milk cows, wagon, plow, harrow, ditcher, two cultivators, and a disk.

History of the renewal is enclosed.

I am submitting this as *collateral* to make up several small payments collected during the past two days.

Very truly yours,
W. F. BUCHHOLTZ.
(Signed) W. F. BUCHHOLTZ.

B/H.

P. S.—It is necessary to give you some of this from time to time for collateral purposes.

1–19–21.

Mr. Triplett:

What did you do with the Franc Inv. Co. note of $11,000.00. According to my records you still have it. Would suggest that you enter it for collection there at the same time holding it as security to overdrafts if any.

To confirm our records, kindly write us acknowledging receipt, or send collection receipt.

Yours very truly,
W. F. BUCHHOLTZ,
(Signed) W. F. B.

1–19–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

COLLATERAL.

Dear Mr. Triplett:

I have taken out the Wapato Construction Co. note of $2500.00 from the collateral to bills payable. In substitution thereof, I offer the following:

B. L. Chaney 1000.00
Statement & History
S. L. Allen 1984.20
Statement

You will observe the former is signed B. L. Chaney Livestock Co. and endorsed B. L. Chaney. The corporation is still in existence. Its only assets are the [131] 19 head of cattle, with the $1000.00 note against them. Chaney is arranging to dissolve them as he and wife are the only stockholders and in reality considers the whole matter as

his personal, but had him sign in this way to cover the point.

I have hopes of getting something on the Chaney note by maturity as he wants to get it out of the way. On the Allen proposition, there is a wide margin for payment out of 1921 crop. Allen is perfectly agreeable to deal with and I will have the chattel cover his entire crop for 1921 and then altho I admit it is very slow paper, yet I would say it is reasonably secure.

If the swap is agreeable to you, kindly change your collateral records accordingly and advise.

Yours very truly,
W. F. BUCHHOLTZ.
(Signed) W. F. BUCHHOLTZ.

1–19–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

General.

Dear Mr. Triplett:

Not much special to-day. Deposits dropped about $3000.00. Drafts on you over to-day's remittance of about $6000.00 with $9000.00 clearings on hand for to-morrow morning. Collected about $2000 in cash on loans, which is over our average of late.

On the Lowe State Theatre account, it is not so bad. Last week they ran behind only $1004, and we got our wire for credit the following morning. In fact we are safe on this as they keep three to five accounts and the pay-roll and expense account

is the one which runs short and usually there is enuf money in others to cover the shortage with good deposits every day and should there be any delay or stop to the thing in New York, we could immediately refuse to give them credit for the shortage slip and would be covered for what we were out in any case. In fact on the average I think they would have about $4000.00 average balance; sometimes much more. For instance they have Madam Pavlowa this week with a special account. It is now over $3000.00 alone and settlement is made at the end of the week and the account all told is not so jerky but to be of some value. Especially right at this time they bring us lots of currency and silver.

Herb took on the $6500.00 H. D. Smith paper without a murmer for which we are grateful.

As a whole, I can't say the situation is getting any worse of late, but it seems that actual cash is getting scarcer and scarcer. Every kind of a deal is always paper, if a fellow sells anything he gets paper or credit on account with a promise to pay soon. Lots of apple growers can't get their money from dealers and things just drift, drift on. I am not talking it or wish it on to myself, but it appears that right at present conditions are getting from bad to worse. Of course the old timers around say you can't expect anything in January and that things don't move around here until Feb., March, and April. Here's hoping.

Sincerely yours,

(Signed) W. F. BUCHHOLTZ. [132]

1–19–21

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

I submit the following notes for rediscount and credit:

H. C. Schumacher & Sons	$ 600.00	due	3–2–21
Wapato Const. Co.	2500.00	due	2–6–21
Wapato Const. Co.	3000.00	due	2–6–21
Jerome Lewis	4600.00	due	3–20–21

Total $10700.00 . .

Schumaker note unsecured, financial statement 1–19–21 Wapato Const. Co. I think is in pretty good shape with prospects of full collection at maturity. History on transaction enclosed together with assignment of amount due on school contract, all told 5 forms.

Jerome Lewis, secured by tax certificates, you know about as you have had it and this is renewal, history enclosed. I know you aren't keen about this. I have the tax c d's in my possession and they total amount shown. We might get considerable on this in 60 days and might not, but in the end I believe the security is good. It is made up of a long list of small items of from $150.00 down and as these are paid, the county treasurer gives Lewis a check and he applies them on the note. During the last 60 days there has been only about $150.00 applied, but Lewis thinks the note will be half absorbed by maturity at least.

I hope you can get this on the books without de-

lay as we will need it to meet that $17,700 draft which will likely reach you Friday.

I will send more as soon as I can get it in shape.

Sincerely yours,

W. F. BUCKHOLTZ.

(Signed) W. F. BUCKHOLTZ.

P. S.—You will observe that I made end. of 1000 on Wapato Const. Co. to-day. The Jerome Lewis note is renewal of note you had. The rest new.

1–19–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

Your letter of the 18th received with reference to charging back rediscount maturities. I fully agree with you that the system is all wrong. It is worse than that. It is rotten, but for the present and no doubt for some weeks, it will remain a question of which is preferable to you—overdrafts or past-due rediscounts. I would like to increase our rediscounts about $20,000.00 and get a balance enuf ahead to cover charges of maturities, but would you consider stuff that will not be paid until 1921 crop returns are in? There is a limit of the liquid stuff and if the maturities are charged up and we have 10 to $15000.00 of it on our books continuously for collection and renewal—you can't keep it down closer; needless to say I will keep pounding away at it with all possible speed.

I know our O. D. was covered to-day; besides I will get out some notes for rediscount in to-day's mail, but keep a stiff upperlip when that $17,700 draft to Seattle Natl. hits you about Friday; in the meantime, we may have some good remittances; to-day was light, altho we have $9000 for clearing in the morning. We collected a little over $2000.00 in cash to-day on loans, but the situation is largely still in a kind of deadlock. [133]

The slip showing O. D. the 18th of $6755.25 received. If our $18,000.00 remittance reached you to-day as it should have covered temporarily and in the meantime I am sending what I think is the best I can scrape up and will continue to send more.

Yours truly,
(Signed) W. F. BUCKHOLTZ.
For Cashier.

January 20, 1921.

Mr. W. F. Buckholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Subject: Brown. Sheep man.

We got you the first time. The matter was discussed in our Executive Committee, and I also had the pleasure of talking it over with our attorney, Mr. B. H. Kizer.

If it were possible to do so, our thought would be for Mr. Brown to go somewhere else to get the money and pay you off. Under present circumstances that is impossible, so the only thing to do

is to "see him through" by putting up the $600 that is needed for shearing and lambing purposes. As Mr. Brown is now coming to you for assistance, this is the time for you to tie up everything he has so there will be no question about the ultimate payment of the loan. We feel you should get a chattel mortgage on his entire bank of sheep amounting to about eleven hundred head; that the mortgage should recite the working arrangement between him and his father-in-law, and that said father-in-law should either in writing or before witnesses who make an affidavit, state the facts of the case as far as he is concerned.

In other words, Brown's ownership of the sheep should be established beyond any question of doubt. In case the old man won't sign, then have Brown issue an affidavit setting forth the facts, have it witnessed and regularly sworn before a Notary Public.

This is about all there is to it, and we feel confident we can leave the matter in your hands for action—our only thought being that Chambers should commit himself so that there would be no misunderstanding.

Sincerely,

W. T. TRIPLETT,
Vice-President.

R.

January 20, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Subject: Gray and Barr notes.

Renewal satisfactory. Your account has been credited $2,880.75 to cover the proceeds of the new notes, and charged $2,900 to retire the old ones.

The main thing as we see it is to watch these boys and not let them be too optimistic about future prices. You no doubt realize that the market on everything is slipping and that at best it is very, very slow. There is not enough idle money in the world to buy any great amount of produce, and on top of that the day to day and hand-to-mouth market is not conducive to higher prices.

Sincerely,
W. T. TRIPLETT,
Vice-President. [134]

R.
Enc.

January 20, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Subject: M. B. Campbell loan.

He owes too much in comparison with his liabilities, and in our opinion you ought to get yours while the getting is good. He is not the sort of customer who will ever be of much value to you,

for by the time he pays a couple of thousand a year interest on his indebtedness and pays his expenses of operating, he will not have enough left to become a valuable depositor. The fact that he has borrowed from another bank is almost sufficient to cause you to sit up and take notice.

I would say collect,—unless he gives you warehouse receipts for a sufficient amount to cover your loans, and he should not place the value of the apples at over $1,00 per box. At that you may get stung. Optimism is a fine thing but we would rather have the money. If he thinks he can get $2.25 or $2.50 a box and can find someone else to finance him, that is the thing for him to do. You cannot depend much on the judgment of a man who this year sold his crop and bought tractors or automobiles, and increased the improvements on his place. If you can get the tickets, of course we will renew for thirty days with the understanding that he pays at maturity.

Messrs. Ellis and Barghoorn both seem to feel that if you put on the pressure too hard the borrowers will begin to talk about the bank, and to some extent we feel they are right,—but on the other hand, fear is about the worst thing in the world. It causes a man to neglect his business and to almost crawl into a hole and pull the hole in after him. The fellow who goes on about his business and does what is right, having the diplomacy of which we well know you are possessed, is bound to come out on top, and I have not the slightest

idea but that you can pull things out along those lines.

Sincerely,

W. T. TRIPLETT,

Vice-President.

R.

January 20, 1921.

Mr. W. F. Buchholtz,

Central Bank & Trust Company,

Yakima, Washington.

Dear Buck:

Subject: E. F. Burrill note.

We have accepted this as substitute collateral against your $20,000 loan. I notice you do not say "security"; you merely used the word "collateral." Nuf sed. However, there are some things we have to make the best of.

The only thing we don't quite understand, is why when the collateral notes are paid you do not apply the amount on the loan instead of substituting something else.

Sincerely,

W. T. TRIPLETT,

Vice-President.

R.

January 20, 1921.

Mr. W. F. Buchholtz,

Central Bank & Trust Company,

Yakima, Washington.

Dear Buck:

Subject: Franc Investment Co.

We are holding the $11,000 note here for safe-

keeping for your account, and as some little protection to your overdraft, although we are not banking on it too much for that purpose, for we do not want an overdraft if it can be helped. [135]

We are looking to you to keep us using black ink instead of red.

Sincerely,

W. T. TRIPLETT,
Vice-President.

R.

January 20, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

In General.

I want to again impress upon you the necessity of keeping right on top of these borrowers and not letting them get away from you. We have had so much grief this year that we have come to realize that no dependence can be put in either the market or the predictions of the borrowers. They are all optimistic and seem to feel that as soon as spring opens up things will begin to move, while, as a matter of fact, there is nothing in sight to verify their predictions. Money is tighter than ever, is hard to get; people are not buying anything unless they have to, and that includes food stuff as well as clothing, and we do not look for any decided movement until prices stabilize somewhere, and the stabilization point has not yet been reached. Things may hang around a given point for a few

days, but everything is on the down grade and they will go a good deal lower before they come back to any kind of normal basis. Prices have been abnormally high, and they must go subnormally low before finally adjusting themselves.

You know how it is: Bill is going to pay you because Tom is going to pay him, and Henry is going to pay Tom, and Jim is going to pay Henry, and by and by Jim fails to sell his stuff and the string is broken and nobody gets his money. The only safe course for a banker to pursue is to get the collateral in his own hands, and use the pressure that is necessary to smoke them out.

I only wish we could look for higher prices; it would mean so much more money in the community for us, and you can bet your last bean that if we thought for a minute prices were going higher we would not advise anyone to sell, for we want all the money in circulation that can be put in circulation. It means bigger deposits for us and greater earnings. On the other hand, we are just as anxious that the farmers and growers sell their produce now instead of waiting until the price goes lower, because in the latter case our deposits slump accordingly.

Your account is overdrawn to-night $7,726.10, and the big Seattle check has not shown up yet. It looks like you will have to pass along a few more rediscounts.

Sincerely,

W. T. TRIPLETT,

Vice--president.

R.

1–20–21.

W. T. Triplett, Secretary.
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

Enclosed find for rediscount and credit the following notes:

John Lufe	400.00	Statement
W. Hasegawa		
H. Tateoka	775.00	" Hasegawa
J. L. Barney	3,000.00	
Ralph B. Williamson	300.00	Secured by U. S. Liberty bonds $400.00
Total	4,475.00	[136]

I will forward the $400.00 liberty bonds to-morrow as they need conversion anyway, and to-night are locked up.

The Luft note $400.00 might not come to requirements, but the old man is an honest fellow and besides himself has two boys working and in some way will manage to clean it up, and besides is in fair shape, owing little.

The Jap note is only 15 days; he has sold spuds and will pay in two weeks.

The Barney note is back once more. Ellis handled Barney while I was out. He voluntarily paid the $500.00 on it and told Ellis we could have it in full any time by a couple days notice. Barney is really in pretty good shape. Barney & Callahan operator strictly cash stores at Yakima, Pasco, Kennewick, Cle Ellum, Roslyn and others, altho in some places the stores are under other names. They are in easy shape, maintain balances at this bank of from $10,000.00 to $20,000.00 continuously.

Barney attends to buying from all and handles all cash. Of late their account has been down to $5,000.00 as they have been sending some funds East, but the turnover is good, the other towns remitting here. There is no doubt that he can draw the money from the store accounts and that he is good for it, and would be entitled to it, as they always have more money in the bank than this note, altho I admit it should be gotten down to a definite commitment as to payment, which we haven't got. If worse came to worse, there is no question but what you could collect this note on the outside.

Yours very truly,
(Signed) W. F. BUCHHOLTZ.

P. S.—I have endorsed these myself as Ellis isn't here to-night.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Re: Rediscounts.

Your account has been credited with $4,411.42 to cover the proceeds of the rediscounts sent in your letter of January 20.

They look better than the average run of notes, and we believe you will be able to work them out. We are not concerned much about Barney, as he seems to have plenty of assets and to be a mighty good customer.

Sincerely,
W. T. TRIPLETT,
R. Vice-President.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Re: Collateral.

As requested, we are using the notes of B. L. Chaney $1,000 and S. L. Allen $1,934.20 as collateral to your loans in place of the Wapato Construction note $2,500.

We could be arrested for what we think of the Allen note. While on paper it sounds good, his statement shows a net worth of such a small amount as compared to what he owes that he seems hopelessly lost in the shuffle. However, for the reason that it has to be done, we are making the substitution for you. Mr. Allen may be able to pay out of his 1921 crop, but all of you fellows who are connected with the Central Bank & Trust Company had better [137] get down on your knees and start to praying that everything will run along right, or I fear you will never get the money.

As a matter of fact, I can't for the life of me see how that loan ever got in the bank. Somebody must have used a gun one dark night when there was nobody else around.

Sincerely,

W. T. TRIPLETT,
Vice-President.

R.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Re: Rediscounts.

Your account has been credited with $10,622.15 to cover the proceeds of the rediscounts sent in your letter of January 19. You have been charged $4,752.48 to retire the note of Jerome Lewis, renewal of which was enclosed to you.

Congratulations on getting the Wapato Construction loan in such good shape. You handled it just right. The only thing left to do is to see that the money they get comes to you to pay off their notes.

As to Jerome Lewis—it is one of those things that may take a long time to work out. Under ordinary circumstances we would not be favorable to making such a loan because things are too uncertain, but for the good of your bank the Executive Committee passed it through.

Sincerely,

W. T. TRIPLETT,

R. Vice-President.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Re: Loewe Theater.

Glad to hear you have this account in better

shape. We talked it over somewhat with Mr. Barghoorn when he was here the other day, and both Mr. Rutter and I are of the opinion that it is not an account which you might ever expect to get much out of.

It is one of those things you have to watch like a hawk, and we believe he should be able to finance his own operations without calling on you for advances at the end of each week.

Sincerely,

W. T. TRIPLETT,
Vice-President.

R.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

In regard to the Associated Fruit Company drafts—we are charging your account to-day as follows: [138]

October	14	$1,277.50
"	"	1,277.50
"	"	1,596.00
"	"	1,240.00
November	20	1,134.00

These have been entered for collection and will be credited to your account when and as paid, but I think you had better get after them and see if you cannot get the money.

There are two other drafts which have been out a good while, and I wish you would see the makers and try to get action at an early date. We refer to

William Joseph, Pittsburg, December 9. $2,060.20 received by us.

I. Cohen & Sons, December 16. $1,000.00 received by us.

Sincerely,

W. T. TRIPLETT,

R. Vice-President.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Enclosed is a memorandum showing a credit for $493.25 to cover the Linse and Frisque notes. 'Nuf sed.

It will be agreeable to us to renew the Barney note when you get a new statement and all the trimmings.

Sincerely,

R. W. T. TRIPLETT,

Enc. Vice-President.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

It will be agreeable to us to exchange $10,000 worth of Liberty Bonds with the County Treasurer, and we are sending you under separate cover by insured, registered mail, the bonds shown on the enclosed memorandum.

Before turning these over we will ask that you not only send us the bank's receipt for the other bonds, but also the receipt which the Federal Reserve Bank sent you in connection with the conversion. We would not want to take the bank's receipt alone, as we would be in the same position as the treasurer, which you will admit is bad business.

We are depending on you to keep track of it, and see that when the bonds come back from the bank they are personally sent to us.

Sincerely,

W. T. TRIPLETT,
Vice-President.

R.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

As I told you yesterday over the telephone, we are well pleased with your [139] letter about the conversation you had with Mr. Ellis in regard to the Wapato Construction Company notes. There is no use in mincing words with that fellow. He either has not the backbone to follow a safe banking practice, or there is something wrong with his noodle. It seems to me that his experience in the last two months should be enough to teach him to go slow, but from our judgment of the man the only thing that can cause him to change his course is a bump right square in the face for himself, and not the bank.

You handled the matter right, and particularly as regards the policy of his directors. Those accounts brought in by Miller and Champ are nearly all dead weight, and there is no use in mincing words with them. The kind of business you should support now is that of non-borrowers who wil have crops and whose deposits can be used to liquidate indebtedness.

Sincerely,

W. T. TRIPLETT,

R. Vice-President.

1–21–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

Collateral.

Enclosed are the B. L. Blood note $400.00 and H. Z. Honda $3000.00 which you returned for endorsement of this bank.

I have taken out the Conrad Weiss note of $1480 odd out of the collateral due to condition of borrower and am substituting the following in its place.

H. Z. Honda	1100.00	due	4–17–21
A. J. Withers	250.00	„	3–23–21

This makes all of Honda's notes up as collateral or $4100.00. This may not look good to you but it is secured by tangible assets consisting of hotel furnishings in two hotels, lease paid on one for 3 years in advance. Furnishings valued at $10,000.00

insured for $8000.00. This is large but when things pick up, the Jap hotels make quick money.

Statement enclosed on Withers. We will get something on that soon.

Yours very truly,

W. F. BUCHHOLTZ.

Enc. 4 (Signed) W. F. BUCHHOLTZ.

1–21–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

Enclosed are original notes as follows:

A. A. McDermid	$1200.00
L. W. Adams	100.00

renewals of rediscounts the same for $1300 and $175.00.

New statement and history on McDermid enclosed.

L. W. Adams cut off $75.00 which he saved up. He hasn't gotten his apple money as yet. You have late statement. He is a clean cut young fellow and hunts up some work when he is idle. States he will clean up his two notes as they stand now by maturity. [140]

On the McDermid statement, I don't like the looks of the payment on his residence, but he assures me will clean up here out of hay and we will watch him.

Also kindly charge our account with $200.00 and endorse on the Baldoser rediscount. He left his check for interest and $200.00 on principal when

I was out. I want to get new statement before renewing and expect to get hold of him to-morrow.

Kindly advise details of entrees and oblige,

Yours very truly,

W. F. BUCHHOLTZ,

(Signed) W. F. BUCHHOLTZ.

P. S.—That makes $375.00 cash collected on your rediscounts today—going some, don't you think?

January 21,1921.

Mr. W. T. Triplett, Sec'y.,
Spokane & Eastern Trust Co.,
Spokane, Washington.

Dear Sir:

Enclosed find the following U. S. Liberty Bonds:

Rate	No.	Kind	Amt.
4¼	9104835	Fourth Loan	$100.00
„	9104828	„	100.00
„	9104829	„	100.00
„	9104827	„	100.00

aggregating $400.00 to be held as collateral to the Ralph B. Williamson note of $300.00. We have no hypo on this, as the bonds were taken out of a bunch of miscellaneous collateral held by this bank to cover any loans made Williamson.

Kindly have your collateral department attend to the conversion of the bonds.

Very truly yours,

W. F. BUCHHOLTZ,

B/H (Signed) W. F. BUCHHOLTZ.

1–21–21.

R. L. Rutter, President,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Rutter:

To give you an idea as to how quickly and unexpectedly a hay farmer can go broke in an irrigated country and secondly my idea as to the importance of complete and thoro statements, the necessity for following up with a second statement after the crop is grown, instead of a statement showing crop estimates—all from the standpoint of the rediscounting bank or the Federal Reserve Bank—I enclose statements as of June 2, 1920 and Jan. 1, 1921 of one Conrad Weiss, a borrower of the Central Bank & Trust Co.

In this instance, first the statement of June 1, 1920 was not complete. The borrower was not questioned closely enough, and the important error was the fact that the bank did not find out that the borrower was growing the hay on some 300 odd acres of Indian lands leased at the rate of $8 per acre, the least constituting a first lien on the crop, and against the crop of $6250 there should have been current debt of $2400 as rent to be paid. [141] Weiss is a Russian, speaks very poor English and he couldn't understand me very well, and I tried German on him, which tickled him to death and I found that I could get his lingo better than he could my English and we got along fine, and I think I have his affairs down very closely. You will note I have his 375 tons of hay down at $10.

Even this is high as it is not baled as yet and a long haul. Weiss says he does not figure on more than $8.00. The Indian who owns the land is a half breed Chinese who gets drunk every few days and goes after Weiss with a long knife until he has him scared to death, so Weiss gave the Toppenish bank and the Case Tractor people chattel mortgages on the hay subject to prior lien of the Indian agent on the lease, and is now staying away from the reservation entirely, telling the Indian agent and the Toppenish bank to sell the hay for him and if there was anything over to send it to us.

Part of the $1500 was borrowed for expense on the hay ranch; and had he been able to get $18 and $20.00 he could have cleaned up his entire current debts, including the $1000.00 land payment. The holder of the land contract has made him no promise to carry the payment over. Even if he does, next fall he will have $2000 to pay on the contract. He has given up the hay farming business and this year will farm only the 25 acres which he is living on. There is only one hope and that is the possibility of getting, say, a $5000 or $6000 mortgage on his place. He is going to put in some sugar beets and other truck, and his two boys are going to work for wages all summer to help get out of debt, and that these boys had agreed to stay with him until he had everything paid off again. He won't need any further credit as they can get by with their milk checks and eggs, having plenty of feed for cows and chickens.

I took a chattel mortgage on horses, cows, hogs, machinery, and all crops to be grown on the 25 acres which is subject to prior mortgage on horses and part of cows to the bank at Toppenish, but he will of course have to meet two payments on his place of $1000 each unless he can get extensions or arrange for a mortgage.

In 1919 this man sold over $5000 worth of hay, paid all he owed and had money left in the bank. It is true that the hay association at Toppenish is selling hay at $14 and $16, but Weiss doesn't belong to the association and they won't handle it for him, baling expense of $3.50, hauling and waste. He will do well to realize $7.00 net which knocks off over $1000 from amount listed.

This shows you how some of these fellows get hit and the necessity of keeping in close touch with borrowers and not taking too much for granted. The June statement looks good and I venture the Federal Reserve wuld have taken the note. A year like this should teach both some bankers and borrowers a few lessons which they should not forget immediately after they have one good year of crops and markets.

There were enough vegetables and fruit rotted in the fields in the Yakima valley to feed thousands and thousands of starving people, and it will appear that the government should have taken action to a least save a part of it when it wouldn't pay harvesting expense. Instead of that, solicitors came around to these very people and asked for cash contributions to aid the starving in Europe.

Weiss says he would have been better off financially if he hadn't harvested his hay at all. Can you beat that?

Sincerely yours,
(Signed) BUCHHOLTZ. [142]

1–21–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

In one of your letters of the 20th you touch the subject of apply collections on collateral notes on bills payable.

The idea is all right and from the viewpoint of ordinary rules and regulations, customs, etc., pertaining to business methods, it can only be the proper thing to do.

Mr. Rutter has written to me that we can expect no increase in deposits with perhaps a spurt upwards now and then, and that the only way of liquidating the indebtedness of this bank is to collect on loans. At present practically all of the paper which I have nerve enough to send for rediscount is there with exception of a small amount in the process of collection or renewal and some miscellaneous small stuff on which we haven't the statements and information up on.

I have talked with other Yakima bankers. They are bearing a heavy burden also, but they are all more or less confident of a good washing out of stuff during the next 90 days, mostly thru apples,

hops, potatoes, and some miscellaneous stuff, few having much confidence in hay. This theory is our only possible chance to liquidate our borrowed money down to a reasonable amount and maintain a cash reserve. Should we have a raise in deposits, even tho it might last only 30 or 60 days, it would naturally help our reserve, altho I admit it would be nothing to depend on and liquidation must naturally continue with the same pressure as before. During the process, which at present is very, very slow, I hope to gradually work down our rediscounts as collected and in this way. If anything substantial is accomplished, the best grade of paper will steadily disappear with the money going out, resulting in no betterment on our reserve condition. Needless to say, reserves must be kept up and the only possible way for the present at least, is that if collections are made on notes hypothecated, to keep the money here and give you something else. Of course the collateral will in this way become more and more of an undesirable nature, but I will keep it in as good shape as it is possible to do, keeping in mind that none of this should be of any question as to collection out of 1921 crops, and I am hog-tying everything of that nature by chattel mortgages on equipment and 1921 crops where there is anything tangible to get a hold of. Under separate cover, I am sending Mr. Rutter a $1500 note of Conrad Weiss, renewal of item held as collateral, and the story that goes with it. This item may appear very bad, but if the proper attention is given it next fall and markets amount to anything at all,

it can be cleaned up at that time, even if we have to close him out and allow his ranch to go back by default, hoping in the meantime that better days are coming and that it won't be necessary to be so harsh.

There is only one way that I know of to raise more cash, and that is by arranging the liberty bond loan in Seattle as we have done with you, giving Herb some real estate contracts and mortgages as collateral if he will take it; this is practically the last breath, and inasmuch as our deposits for the last ten days or so have held their own quite well at about $440,000 to $455,000, I have lived in hopes that we could get by without this last effort and avenue of relief.

In view of these conditions, if it can be worked out, it will be worked out, and I know that you have to stretch your imagination and use a high powered microscope in looking at the favorable points to the situation; in fact compare this institution to a man at the point of death but with a hopeful doctor on the case who is able to detect a slight heart action, and altho the patient was rapidly failing two weeks ago, the doctor's report is that for the past two weeks now have indicated nothing worse developing, with a possible gain in strength scarcely discernible, and speaking to the patient's wife and children, you would say that he had good chances for complete recovery. [143] In concluding, unless you insist, we will continue to hold what few pennies we might collect on your collateral notes

and substitute other stuff, which I hope you will O. K. for the present.

Sincerely yours,
W. F. BUCHHOLTZ.
(Signed) W. F. BUCHHOLTZ.

January 22, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

The rediscount notes of McDermid and Adams came this morning, and we have put them through our books. Your account has been credited $1,285.-31 to cover the new notes, and charged $1,673.13 to retire the old ones.

I don't like Mr. McDermid's statement very much, and I think you had better keep your eye on him to see that he does not divert his funds when he sells his hay. This is one of those cases where the first fellow who gets to the customer gets the money.

Sincerely,
W. T. TRIPLETT,
Vice-president.

R.
Enc.

1–23–21.

R. L. Rutter, President,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Rutter:

Enclosed is list of loans which I think can be col-

lected in full during next 90 days aggregating $147,-941. This of course does not include partial reductions on those which cannot be collected in full. There is considerable of that class. I have gone over it somewhat and a conservative estimate of cash collection possible out of that I think can be placed at $50,000. I am not taking Ellis's ideas closely and on such paper as I have had no opportunity to check up with the borrower. I have taken considerable salt with his estimates. Where he figures cleanups on some, I have in some cases figured as low as 50%, playing hunches and what information I have picked up and can read between the lines on old statements, discounting heavily where hay is depended on largely and the margins are not closely known.

This will be part of my report and I will appreciate it if you will have the sheets filed so that when I get it all there, they can be fastened together to make it complete. I am pushing along on the report at Mr. Triplett's suggestion and have a good start, but as it is a Sabbath night my conscience tells me that 11:30 is late enough and I know I should have gone to church and prayed for strength and good luck, but I have an alibi which I believe justifies my working tonight. Doesn't the gospel teach us that if it is possible to do some good for your fellowmen on a Sunday, to do it? I believe if I can be of some service in saving a part of the depositors here from loss of their hard earned cash, especially the widows and orphans, I should be per-

fectly justified in working to-night instead of attending church.

I am beginning to make a little speed on the little Corona which I have in my room, but as I am a touch operator it is awkward to change back to the Hunt & Peck system; besides the two shifts for capitals and figures bother me and that accounts for the poor work, but I trust you can make it out, and I am improving rapidly, as well as gaining speed.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ. [144]

January 24, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

The patient's friends and family are glad to hear that he is better; that he is no worse, and that he shows good prospects for improvement in the near future. This is extremely gratifying, but in the last analysis it means that the doctor must stay on the job night and day so as to be prepared for any relapse which may come, and to change the medicine if that is desirable. You know the old story about "A stitch in time saves nine." I don't know whether I learned that out of the back of an old spelling book or dictionary, or whatever it was, but nevertheless, it holds as true to-day as ever.

Your method of handling the collateral notes, while satisfactory from your standpoint, is not so

satisfactory to us, for the reason that our collateral will keep getting more and more shoddy as time goes on. We are willing and ready to stand back of the institution to a reasonable extent, but feel in so doing we should have a class of paper which will prevent any loss on our part. Many of the notes we have taken on are not up to our regular standard, and it was only because of your judgment after investigating at close range that we were willing to take them. Naturally, we do not want to take any more uncertain paper if it can be helped.

Our Executive Committee feels that you should immediately get in touch with Herb, and if possible arrange for him to purchase the Liberty Bonds from you, with the understanding that you will repurchase them within a reasonable time; also that he will permit you to put up notes and mortgages at the rate of one and one half to one behind the $30,000 he is now carrying for you. This will give you $30,000 additional money and should enable you to go on without any further assistance from us.

You will appreciate that we are already carrying a very heavy load for the bank, and that Herb ought to be willing to do that much for you. I think he will if you go at him in the right way, and remember, every nickel you shift over there means just that much to us. In case, however, he will not do that, get him to purchase the Liberty Bonds and send us your note for $30,000 collateral by one and one half to one of "good but slow" paper. What I mean by that, is paper which although it will ulti-

mately be paid cannot be liquidated from so-called quick assets.

It is one thing for us to get behind the bank and another thing for us to take a loss on it. Deposits are bound to slump, but we do not want to be in a position of having to pay them off at a sacrifice to our stockholders.

I mention these things so you will understand that while our feeling is the most friendly in the world and we are willing to do everything we can as long as the stuff is reasonably good, we do not want to get into the position where we will ultimately lose anything.

It seems to us with deposits slipping the way they are, and with the prospects ahead none too good, the deal for the sale of the bank should be hurried along as fast as possible, so that our mutual friend, Mr. Barghoorn will get out without greater loss than he will now sustain. In other words, I would rather take the prospective purchasers up on their own proposition than to hold for a higher price. If conditions go on much longer as they are now the institution will soon be in a place where no one will purchase, and then it is a case of either closing its doors or getting someone to see it through.

Sincerely,

W. T. TRIPLETT,

Vice-president.

Buck:

Our people aren't satisfied with the small notes. They think he is broke. Better dig around in the

old walnut sack and see if you can't substitute something else. [145]

January 24, 1921.

Mr. W. F. Buchholtz,
c/o Central Bank & Trust Co.,
Yakima, Washington.

Dear Buck:

This will acknowledge receipt of the collateral notes of H. Z. Honda for $1100.00 and A. J. Withers for $250.00 in replacement of the note of Conrad Weiss for $1486.39, sent you for collection.

We also received the two notes of B. L. Blood for $400.00 and H. Z. Honda for $3000.00 sent you for endorsement.

Yours truly,
W. T. TRIPLETT,
Vice-president.

B.

1–23–21.

R. L. Rutter, President,
Spokane & Eastern Trust Co.,
Spokane, Wn.

Dear Mr. Rutter:

The last three days, I have felt very discouraged with the way things have been going. As already advised, I have not expected to make a great showing in reducing rediscounts during January; in fact, I have felt that if we were able to keep up sufficient reserve to keep from overdrawing in Spokane, Iwould be pleased. I had hoped that after the liberty bond arrangement was made, giving us

$20,000.00 more working cash, plus some $60,000 more in rediscounts credited that we would be able to maintain a balance to our credit.

On Jan. 5th when I arrived here, we had about a $50,000.00 overdraft with some $8000.00 in fruit drafts gone hay-wire not charged back, making a total shortage of about $60,000.00 at that time. In addition to covering this, our deposits dropt from $482,000.00 to $430,000.00 Friday night, which is rock bottom to date. You will see at a glance how far the above $80,000.00 new money went.

During the 17 days that I have been here we have collected in cash a total of $15,259.08 and the enclosed adding machine slip will indicate that about $10,000.00 of this consisted of small items and that very little large amounts have come in and I don't expect anything large for ten days more; but to get down to my subject of reserves: The large items when they do come in will of course go on rediscounts with no improvement in our reserve. It is reasonable to expect that our deposits will remain above $400,000.00; in fact, we have hopes that they will hold up pretty well to where they are. The past week the shrinkage has not been bad and all of a regular nature, but to face possibilities square in the face, say we drop to $400,000.00 during the next two weeks, with collections on stuff in our pouch here to perhaps $10,000 it will hit our reserve to the extent of $20,000.00 more. This is a conservative view and we of course hope it will not be that bad. As we stand at this time, if all items are in the counting the $6500 in apple drafts charged

back the 21st, we will have an actual overdraft of about $15,000, and I cannot figure out more than $5000 of notes in our pouch here that can be expected to possibly pass muster for rediscounting unless I run on to something as I take new statements—some borrowers we have no statements whatever. [146]

There can be no sudden large drop in deposits other than a possible actual run on the bank which we have seen no signs of for ten days or more.

I have as yet, nothing completed in the shape of figures as what can be expected in liquidation during the next 90 days, which depends of course on the market on apples, hops, potatoes, and hay, in proportion and importance as per order named, we being fortunate not to have a great lot of hay loans where the margin is short. As written heretofore, business men and bankers here are confident of a good movement during February and March, tapering off in April. If there is not, I might add that there are many other institutions besides this one which will not be able to stand the test.

Altho I have not totaled up exact figures on loans based on each commodity and the probable liquidation thereof, if deposits keep up to where they are or nearly so, enabling us to keep up a reserve, I feel justified in making the statement that I am still confident of cutting down our borrowed money to a nominal amount if not entirely during the next 90 days.

Now I know very well that you don't want an overdraft, especially not running up into large

amounts, and needless to say, I am making every effort to better that condition, and as stated am nearly at the end of the rope unless one or two things can be done.

If Mr. Barghoorn can arrange to carry our liberty bond loan in Seattle, we might possibly arrange with the bank there to carry a note of $10,000 secured by slow but eventually good stuff, in the shape of real estate contracts and mortgages. This is one possibility which would help. The second is for the S. & E. to rediscount the Franc Inv. Co. note of $11,000.00 and the Johnson Drainage note of $5000.00 to be endorsed by Mr. Barghoorn. If neither of these arrangements are possible, there is only one more avenue of relief, and that is to whip up some of the stuff you are holding as collateral into rediscounts and substitute a poorer class of security.

Otherwise before we can collect enough to get ahead on reserve, the overdraft will be there and it will run up to $10,000 and $15,000 no doubt, perhaps more if deposits drop, and more drafts for fruit are charged back. In fact, it sifts itself down to whether you desire by all means to keep this institution open by all possible means, depending more or less on Mr. Barghoorn's personal credit, or whether you have set a limit as to how far you will go. Should the expected liquidation during the next 90 days fall far short, and it is necessary for you to carry, say $50,000.00 more of more or less paper of slow nature, which will reach an enormous sum by that time, I might add that I believe

the possibilities of the institution for future business and earning power to charge off bad paper is here. A bank is needed in this location and a good volume of business is assured, and with close and proper management, there is no doubt in my mind but what the indebtedness carried by the Spokane & Eastern Trust Co. can eventually be worked out and kept within reasonable bounds and worked into a valuable account.

The problems and work to keep up reserves is not at all an easy matter. The suspense is awful, waiting for something to move and bring in cash. It is by far the most stupendous task you have ever seen fit to put me to. I appreciate your confidence and am not weakening, but if you could write me a letter stating whether or not you will back the institution and myself any further in case of necessity it will greatly strengthen my morale, and I will benefit by knowing what to expect, and my very best efforts are pledged to you to get the situation worked out.

Yesterday, we mailed a $51,000.00 draft on you to the Seattle National Bank covering a large letter of items on other local banks, the net of which has been remitted to you and no doubt we will have a few dollars there to meet it. The draft will likely reach you Tuesday or Wednesday and if you pay it the overdraft created will be the limit to date of credit advanced this institution. Have Mr. Triplett ascertain the amount of the overdraft created [147]

if this draft is paid. If you do not pay it we are gone.

Sincerely yours,
W. F. BUCHHOLTZ.
(Signed) W. F. BUCHHOLTZ.

P. S.—I might add that by keeping the institution open and if necessary advance further requirements which could hardly total over $50,000.00 more in any event, that it will in my positive opinion result in a much shorter time for the Spokane & Eastern Trust Co. to get their money back then to close it up. We still have hopes of a sale to bolster the situation up, but I am not depending on that.

1–24–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

General.

Looks pretty nice to get a slip showing a $39,000 balance for Saturday, but wow, you wait till that big draft hits you to-morrow or Wednesday, which, together with the drafts charged back, will mean an overdraft of probably $15,000 again.

I have written Mr. Rutter a letter in regard to the situation, and to be frank I cannot figure out any chance of keeping the balance in our favor outside of the methods outlined therein. I have about $2500 in new stuff for rediscount in shape, but the notes are locked up and will forward the stuff to you to-morrow. I can send you some other

low grade stuff, if it would suit you better than an overdraft for the present.

Wish you would write me frankly on how the S. & E. feels about things here and whether we can expect you to honor our drafts if the overdrafts should go up to $25,000.00 or a little more, say for ten days or so and see if something doesn't develop by then.

Things don't look entirely hopeless on the apple situation. Smith showed me a telegraphic order for four cars at $2.50 to him, which is 40¢ over last week's prices, and he says inquiries are coming in thick to all the dealers, and that they all look for good business during February. Hay is being shipt every day now at $16.00, that is A1 stuff and altho the volume isn't so great, it shows that something is doing.

Perhaps I am taking things too seriously, but I had hoped that that large bunch of rediscounts and the liberty bond arrangement would keep our overdraft covered, but that bunch of E. S. Small drafts during the past few weeks aggregating about $8,000 or $10,000 has put an awful crimp into us, together with the slow regular shrinkage in deposits has run us out of funds. Some money is coming in on notes but it doesn't amount to anything in the way of helping the situation, and unless things improve this week I don't know what we are going to do, unless the S. & E. will carry the institution thru.

To-day it didn't get any worse. We collected about $1,700.00—$1,000 of which went on your re-

discounts, with a drop in deposits of only $1500. I wish I could make things as easily as some people I know, and perhaps I should feel more at ease about it, depending more or less on the strength of your letters and Mr. Rutter's that you would back me up. You have taken on everything I have sent for rediscount it is true, but I haven't the nerve to send you any junk for that purpose and the overdraft keeps wearing and the paralytic circumstances here ride on me. The suspense is awful. [148]

I am going to bed a little early to-night. Sunday morning after I had breakfast and went to my room, I felt as tho I hadn't had sleep enough and thought I would flop on the bed for a short rest. I dropt off to sleep with my clothes on and no covers and didn't wake up for three hours. As a result I took a cold in my head. It isn't so bad tho and won't bother me much to-morrow. I have been very busy again to-day going over things with borrowers altho I didn't get much money. I had to renew that Arslan paper and I have a complete statement of their actual condition. The last statement I sent is all wrong. That fellow don't understand English and to-day I got hold of the older brother who is quite well educated and I have it lined up. We won't get anything on that until April, likely $2000.00 then and a cleanup in July, not out of hop sales but out of advances on new contract for 1921 crop. We have this covered by an assignment of amounts called for in contract now. The contract calls for $17,000.00 to be ad-

vanced in April, July and September, and I think we are safe on it now. The total is $5000.00.

I keep running on to little stuff where fellows paid somebody else and have nothing left of their crops. You are right when you say you have to grab the money when they sell something. Cash is a pretty scarce article around here and when a farmer gets a little of it, somebody soon separates him from it. A $1,000 which I had figured on slipt away in a peculiar manner. Clyde Lee who owes that amount was in here a short time ago and agreed to sell enuf cattle to clean us up and I had confidence in him that he would do it. He had some cattle near Toppenish feeding them some cheap hay and drove them off alone to some unknown person in that section and apparently sold them. Saturday the 15th he phoned his wife that he would be home the following Sunday. That night he wrote her a letter in a Toppenish hotel to the effect that he had collected $300.00 cash on the cattle and would get the balance in February and they would then have enough to pay all their debts including the bank which he mentioned in the letter. Lee has never been seen or heard of since. He registered at that hotel but the bed indicated that he had not used it. The postmaster states that the letter was mailed between 6 and 8 that Saturday night. A piece of a kind of car case with his identification in the face was found in a freight shed at Toppenish on Monday. That is the only clue and it seems he has been snatched off of the earth as searching parties

have given up hopes. Old man Davis who has known Clyde Lee for 13 years says there is absolutely no chance of him beating it with the money and leaving his family and that it is no question but a case of foul play. Lee has $6,000 insurance but his statement doesn't indicate what companies. Don't know if any Western Union or not. Mr. Rutter might have this checked up. Haven't seen Ross about it yet. It is likely that he was knocked in the head for the $300 he had on him and his body dumped into some canyon. Believe me, the times are beginning to show up on the unemployed and Toppenish and Yakima have some tough nuts hanging around. To-night as I was on my way to the bank, crossing the tracks where it is not very light, a big rough looking fellow stopt me and said in a gruff tone "Give me a half a dollar to get something to eat." There weren't any people near and it was kind of dark and as he didn't ask for a very large sum, I quietly handed him the four bits which he grabbed and walked off. I thot that was the healthiest and most economical way out and as he talked in such a firm, determined tone, I didn't go into details with him either nor argue the question with him. Something told me to close the transaction quickly and make a get away without trying to Jew him down any or discourage the idea for in the meantime, if no people showed up, he might begin to think that 50¢ wasn't enough and might invite me to step in the dark behind the warehouse and enter into negotiations for more. There is a gang of them here. Sunday night they

held a parade and street speeches. They are getting so bold that in one instance they pushed their way into a cheap rooming house one night and slept there in spite of the proprietor's efforts to the contrary.

Well, I must beat it to bed. I'm not much good for business to-night, but will be feeling better in the morning I am sure. I look forward to your letters as the event of the day and any encouragement and assistance or suggestions help a lot right at this time. You see I don't know [149] just how far you can go on S. B. and since he has resigned from the board, it must put it down to a clean cut proposition.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

January 25, 1921.

W. T. Triplett, Vice-Pres.,
Spokane & Eastern Trust Co.

Dear Sir:

With reference to the draft on William Joseph, Pittsburgh, $2,060.20, received by you on December 9th:

This is one of E. S. Small's drafts and as Small is out of the city for a few days, I am unable to get in touch with him, to run it down.

I am, however, wiring William Joseph today asking reasons for non-payment and will let you know of any results as soon as I hear from him.

Very truly yours,
W. F. BUCHHOLTZ,
(Signed) W. F. BUCHHOLTZ.

B/H [150]

After the close of all the evidence and after the case had been argued, the following stipulation was entered into between the attorneys for the Spokane & Eastern Trust Company, for the Central Bank & Trust Company, and for the plaintiff, to wit:

In this cause the Court having ruled that defendant, Spokane & Eastern Trust Company is entitled in the decree to have provision made for the return to it of all promissory notes and choses in action, being the rediscounts and securities charged-back against the Central Bank and Trust Company by the Spokane & Eastern Trust Company by the close of business on the 25th day of January, 1921, a list of which is hereto attached, the defendant Central Bank and Trust Company and E. L. Farnsworth, as Director of Taxation and Examination of the State of Washington, contest the right of defendant Spokane & Eastern Trust Company to such a provision in the decree. However, as the court has so ruled and as it will be necessary to take some details of evidence to identify these several items, either before the Court or before the Master, and the defendant E. L. Farnsworth, as Director of Taxation and Examination of the State of Washington, and Central Bank and Trust Company object to the taking of any further evidence in that behalf, but the Court having ruled it may be taken, now without waiving the objections above expressed, or any of them, or any other objection

which might be taken to the said defendants the Central Bank and Trust Company and the said E. L. Farnsworth, in said respects, or any of them, but solely for the purpose of saving the time and labor of making the formal proof, IT IS STIPULATED that such further evidence, if taken, would show the following to be a correct list of said promissory notes and choses in action so charged-back: [151]

MAKER	PAYEE	AMOUNT	DATE
Brown, C. O.	Central Bank & Trust Co.	$4,600.00	Oct. 25, 1920
Interest to Jan. 25, 1921		.90	
Paddock, H.	"	1,500.00	Dec. 20, 1920
Interest to Jan. 25, 1921	"	1.75	
McDermid, A. A. & McDermid, R. C.	"	500.00	Dec. 20, 1920
Interest to Jan. 25, 1921		.58	
Baldozer, A. E.	"	1,100.00	Dec. 20, 1920
Interest to Jan. 25, 1921		1.22	
Kimura, J.	"	3,000.00	Dec. 23, 1920
Interest to Jan. 25, 1921		1.75	
Sunset Fruit & Produce Co.	"	4,000.00	Dec. 23, 1920
Interest to Jan. 25, 1921		2.33	
Small, E. S.	"	5,500.00	Dec. 23, 1920
Interest to Jan. 25, 1921		3.21	
K. T. Produce Co.	"	3,000.00	Nov. 18, 1920
Interest to Jan. 25, 1921		4.67	
Campbell, M. B.	"	2,200.00	Dec. 17, 1920
Interest to Jan. 25, 1921		3.42	

Dated this 24th day of July, 1922.

GRAVES, KIZER & GRAVES,
Attorneys for Spokane & Eastern Trust Company.

R. J. VENABLES and
H. B. RIGG of Counsel,
Attorneys for Central Bank & Trust Company.

PETERS & POWELL,
Attorneys for United States Steel Products Company. [152]

Certificate of Judge to Statement of Evidence.

I, F. H. Rudkin, Judge of the above-entitled court, and the Judge before whom this cause was tried, find the foregoing statement and abstract of evidence to be a true and complete statement of the evidence given upon the trial of the cause, and that it is properly prepared; and I hereby approve it as a statement of the evidence to be filed in this cause and used on appeal herein.

The Clerk is directed to file such statement in this cause and make it a part of the record herein for the purposes of appeal.

Dated 5th January, 1923.

FRANK H. RUDKIN,
Judge. [153]

[Endorsed]: Number 881. Statement of Evidence on Appeal. Filed in the U. S. District Court Eastern Dist. of Washington. Jan. 6, 1923. Alan G. Paine, Clerk. Edw. E. Cleaver, Deputy. [154]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

UNITED STATES STEEL PRODUCTS COMPANY,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY, CENTRAL BANK AND TRUST COMPANY, and E. L. FARNSWORTH, as director of Taxation and Examination of the State of Washington,

Defendants.

Petition for Appeal.

The petition of the Spokane & Eastern Trust Company, a defendant herein, respectfully represents:

The defendant Spokane & Eastern Trust Company is aggrieved by the judgment and decree rendered herein signed 25th July, 1922, and filed 27th July, 1922, wherein and whereby judgment was given in favor of the plaintiff and against the defendant Spokane & Eastern Trust Company in the sum of forty-four thousand nine hundred forty-three and 84/100 ($44,943.84) dollars, together with interest thereon at the rate of six per cent per annum from 24th January, 1921, and for the costs of the action, and by all other relief awarded in said judgment and decree in favor of plaintiff and

against this defendant, and for the reasons specified in the assignment of errors filed herewith the defendant Spokane & Eastern Trust Company desires to appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit.

Said defendant presents herewith and makes a part of this application an assignment of errors in this cause and tenders a bond in such amount as the Court may require for the purposes of the appeal, and prays that the petition may be allowed and that a transcript of the entire records, proceedings, testimony and papers upon which the said decree was made, duly authenticated, shall be sent to the Circuit Court of Appeals for the Ninth Circuit in the manner and form and at the [155] time prescribed by law and by the rules of said Circuit Court of Appeals.

Said defendant prays for all orders necessary in the premises and for general relief.

F. H. GRAVES,
W. G. GRAVES,
B. H. KIZER,
Solicitors for Defendant Spokane & Eastern Trust Company.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Filed Jan. 6, 1923. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy. [156]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

UNITED STATES STEEL PRODUCTS COMPANY,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY, CENTRAL BANK AND TRUST COMPANY, and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,

Defendants.

Assignment of Errors.

The defendant Spokane & Eastern Trust Company, being desirous of appealing to the Circuit Court of Appeals for the Ninth Circuit from the final decree rendered in this cause, bearing date 25th July, 1922, and filed 27th July, 1922, submits the following assignment of errors which it asserts and intends to urge on such appeal.

The District Court erred:

I. In holding that the allegations of the complaint were supported by the proof save with respect to the particular manner in which the check of the Yakima Hardware Company was paid.

II. In holding that the transactions between the Central Bank & Trust Company and Spokane & Eastern Trust Company were contrary to sound law and good morals.

III. In holding that the relation of trustee and *cestui que trust* subsisted between the Central Bank & Trust Company and plaintiff with respect to the proceeds of the check of the Yakima Hardware Company which the Central Bank collected for plaintiff.

IV. In holding that the relation of trustee and *cestui que trust* subsisted between the Spokane & Eastern Trust Company and plaintiff.

V. In holding that the proceeds of the check aforesaid was traceable as a trust fund in the hands of either the Central Bank & Trust Company or the Spokane & Eastern Trust Company. [157]

VI. In refusing to dismiss the action as against the Spokane & Eastern Trust Company for want of equity.

VII. In rendering a decree for any relief or in any amount in plaintiff's favor and against defendant Spokane & Eastern Trust Company.

VIII. Finally, if it be held that plaintiff was entitled to any relief against the defendant Spokane & Eastern Trust Company, then the District Court erred in not reducing the amount of the recovery by the amount of the drafts drawn upon the Spokane & Eastern Trust Company by the Central Bank & Trust Company and paid by the former prior to the time it was informed of the draft for $51,188.04 drawn upon it by the Central Bank & Trust Company in favor of the Seattle National Bank and of the circumstances surrounding the drawing of such draft.

WHEREFORE, the defendant Spokane & Eastern Trust Company prays that the said decree be reversed and that the District Court be directed to dismiss the action as to such defendant.

F. H. GRAVES,
W. G. GRAVES,
B. H. KIZER,
Solicitors for Defendant Spokane & Eastern Trust Company.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Filed Jan. 6, 1923. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy. [158]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

UNITED STATES STEEL PRODUCTS COMPANY,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY, CENTRAL BANK AND TRUST COMPANY, and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,

Defendants.

Order Allowing Appeal.

Upon consideration of the petition and an assign-

ment of errors presented therewith, it is ordered that an appeal be allowed to the defendant Spokane & Eastern Trust Company from the decree rendered in this cause dated 25th July, 1922, and filed 27th July, 1922, wherein and whereby judgment was rendered against the said defendant in favor of plaintiff in the sum of forty-four thousand nine hundred forty-three and 84/100 ($44,943.84) dollars, and for other relief, and that the appeal shall be returnable to the United States Circuit Court of Appeals for the Ninth Circuit upon the execution of a bond in the penal sum of one thousand ($1,000) dollars.

It appearing that the defendants Central Bank & Trust Company and E. L. Farnsworth, as director of taxation and examination of the State of Washington, have in writing stated that they would not join the defendant Spokane & Eastern Trust Company in its appeal herein and that they waived their right to so join,—

IT IS ORDERED that the defendant Spokane & Eastern Trust Company may prosecute its appeal independently of its codefendants and that they need not be joined as appellants with it for the purposes of this appeal. [159]

And it is still further ordered that a transcript of the record, in accordance with the provisions of law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, shall be authenticated and transmitted to the Court of Appeals as prayed.

Dated 5th January, 1923.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Filed Jan. 6, 1923. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy. [160]

In the District Court of the United States for the Eastern District of Washingon, Southern Division.

IN EQUITY.

UNITED STATES STEEL PRODUCTS COMPANY,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPAY, CENTRAL BANK AND TRUST COMPANY, and E. L. FARNSWORTH, As Director of Taxation and Examination of the State of Washington,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, the Spokane & Eastern Trust Company, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound

unto the United States Steel Products Company in the sum of One Thousand Dollars, to be paid to the said United States Steel Products Company, its successors or assigns, to which payment well and truly to be made we bind ourselves and our successors, jointly and severally by these presents.

Sealed with our seals and dated this 5th day of January, in the year of our Lord one thousand nine hundred and twenty-three.

WHEREAS, at a term of the District Court of the United States for the Eastern District of Washington in the Southern Division thereof, in a suit depending in said court between the United States Steel Products Company, plaintiff, and the Spokane & Eastern Trust Company and others, defendants, a decree was rendered in favor of plaintiff and against the defendant Spokane & Eastern Trust Company; and

WHEREAS, the defendant Spokane & Eastern Trust Company has sued out an appeal to reverse such decree and has prayed the allowance of the appeal and citation directed to the United States Steel Products Company to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit; [161]

NOW, the condition of the above obligation is such that if the aforesaid Spokane & Eastern Trust Company shall prosecute its appeal to effect and answer all costs if it fail to make its plea good, then the above obligation shall be void; otherwise it shall

remain in full force and virtue.

SPOKANE & EASTERN TRUST COMPANY,

[Seal] By CONNER MALOTT,

Its Vice-President.

B. M. CAMPBELL,

Secty.

FIDELITY & DEPOSIT CO. OF MARYLAND,

By S. M. SMITH,

Attorney-in-Fact.

[Seal] Attest: W. S. McCREA,

General Agent.

The foregoing bond is approved for the purposes of the appeal herein, 5th January, 1923.

FRANK H. RUDKIN,

Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Filed Jan. 6, 1923. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy. [162]

[Endorsed]: No. 3983. United States Circuit Court of Appeals for the Ninth Circuit. Spokane & Eastern Trust Company, a Corporation, Appellant, vs. United States Steel Products Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District

Court for the Eastern District of Washington, Southern Division.

Filed February 3, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Circuit Court of Appeals for the Ninth Circuit.

SPOKANE & EASTERN TRUST COMPANY,
Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY,
Appellee,

and

CENTRAL BANK & TRUST COMPANY and E. L. FARNSWORTH, as Director, etc.,
Defendants.

Statement of Errors for Purpose of Printing Record.

The appellant will rely upon the following errors in presenting its appeal herein, to wit:

The District Court erred:

1. In holding that the transactions between the Central Bank & Trust Company and the Spokane

& Eastern Trust Company were contrary to sound law and good morals.

2. In holding that the relation of trustee and *cestui que trust* subsisted between the Central Bank & Trust Company and the United States Steel Products Company with respect to the proceeds of the check of the Yakima Hardware Company which the Central Bank collected for the United States Steel Products Company.

3. In holding that the relation of trustee and *cestui que trust* subsisted between the Spokane & Eastern Trust Company and the United States Steel Products Company.

4. In holding that the proceeds of the check aforesaid were traceable as a trust fund in the hands of either the Central Bank & Trust Company or the Spokane & Eastern Trust Company.

5. In refusing to dismiss the action against the Spokane & Eastern Trust Company for want of equity.

6. In rendering a decree for any relief or in any amount in favor of the United States Steel Products Company and against the Spokane & Eastern Trust Company.

7. If it be held that United States Steel Products Company was entitled to any relief against the Spokane & Eastern Trust Company, then there was error in not reducing the amount of the recovery by the amount of the drafts drawn upon Spokane & Eastern Trust Company by the Central Bank & Trust Company and paid by the former prior to the time it was informed of the draft for $51,188.04

drawn upon it by the Central Bank & Trust Company in favor of the Seattle National Bank and of the circumstances surrounding the drawing of such draft.

F. H. GRAVES,
W. G. GRAVES,
B. H. KIZER,
Solicitors for Spokane & Eastern Trust Company.

[Endorsed]: No. 3983. In the Circuit Court of Appeals, for the Ninth Circuit. Spokane & Eastern Trust Company, Appellant, vs. United States Steel Products Company, Appellee. Statement of Errors for Purpose of Printing Record. Filed Jan. 25, 1923. F. D. Monckton, Clerk. Re-filed Feb. 3, 1923. F. D. Monckton, Clerk.

Service of the within Statement of Errors accepted this 17th day of January, 1923.

PETERS & POWELL,
Attorneys for Appellee.

In the Circuit Court of Appeals for the Ninth Circuit

SPOKANE & EASTERN TRUST COMPANY,
Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY,
Appellee,

and

CENTRAL BANK & TRUST COMPANY and E. L. FARNSWORTH as Director, etc.,
Defendants.

Designation of Parts of Record to be Printed.

The appellant designates for printing the following portions of the record which it thinks necessary for the consideration of the errors on which it intends to rely on appeal, as shown by the statement of errors heretofore filed herein, to wit:

Complaint.

Answer of defendant Spokane & Eastern Trust Company.

Answer of defendants Central Bank & Trust Company and E. L. Farnsworth as Director of Taxation and Examination of the State of Washington.

Memorandum opinion of Judge Rudkin ordering the entry of a decree in the plaintiff's favor.

Stipulation entered into between the attorneys for all the parties dated 24th July, 1922, relative to certain promissory notes and choses in action which had been charged back by the Spokane & Eastern Trust Company to the Central Bank & Trust Company and returned to the latter company.

Decree.

Stipulation for the signing and certifying of the statement of evidence.

Statement of evidence.

Petition for appeal.

Assignment of errors.

Order allowing appeal and fixing bond.
Bond on appeal.

F. H. GRAVES,
W. G. GRAVES,
B. H. KIZER,
Solicitors for Spokane & Eastern Trust Company.

[Endorsed]: No. 3983. In the Circuit Court of Appeals, for the Ninth Circuit. Spokane & Eastern Trust Company, Appellant, vs. United States Steel Products Company, Appellee, and Central Bank & Trust Company and E. L. Farnsworth as director, etc., Defendants. Designation of Parts of the Record to be Printed. Filed Jan. 25, 1923. F. D. Monckton, Clerk. Re-filed Feb. 3, 1923. F. D. Monckton, Clerk.

Service of the within Statement of Errors accepted this 17th day of January, 1923.

PETERS & POWELL,
Attorneys for Appellee.

IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SPOKANE & EASTERN TRUST COMPANY,
Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY,
Appellee,

and

CENTRAL BANK & TRUST COMPANY and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,
Defendants.

No. 3983

Appeal from District Court, Eastern District of Washington

APPELLANT'S OPENING BRIEF

F. H. GRAVES
W. G. GRAVES
B. H. KIZER,
Spokane, Washington
Solicitors for Appellant.

EMPIRE-PACIFIC PRINTING CO., SPOKANE

FILED

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SPOKANE & EASTERN TRUST COMPANY,
Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY,
Appellee,

and

CENTRAL BANK & TRUST COMPANY and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,
Defendants.

No. 3983

Appeal from District Court, Eastern District of Washington

APPELLANT'S OPENING BRIEF

F. H. GRAVES
W. G. GRAVES
B. H. KIZER,
Spokane, Washington
Solicitors for Appellant.

STATEMENT OF THE CASE

The United States Steel Products Company, the appellee, was plaintiff below and will herein be called the plaintiff. Appellant, the Spokane & Eastern Trust Company, will be called the Trust Company, and its co-defendant, the Central Bank & Trust Company, will be called the Central Bank or the Bank. Where amounts are referred to they will be stated in round figures unless it may chance that the exact sum is material.

By its complaint plaintiff sought to charge the Trust Company as trustee of $47,000, the proceeds of a collection made for plaintiff by the Central Bank. Broadly stated, these are the facts involved: At the time of the transaction upon which plaintiff bases its action, the Central Bank, which is now insolvent, was a banking house at Yakima, Washington. It was rather a small bank, having a capital of but $50,000, with deposits of approximately $500,000. It was not a member of the Federal Reserve System. For several years the Trust Company, whose banking house is at Spokane, had been a correspondent of the Central Bank, the latter having an active account with it. When the deflation period began in 1920, the deposits of the Central Bank began to shrink, and it was necessary for it to obtain money from time to time from outside sources. Its principal shareholder and president was one Sikko Barghoorn, a resident of Spokane, who was a man of considerable means, con-

trolling at least one other country bank, the Colville Loan & Trust Co., and since 1908 a director of the Trust Company. As the Central Bank began to feel the pinch of deflation, Barghoorn applied to the Trust Company for financial assistance. The Trust Company loaned the Central Bank $20,000 on its note, secured by collateral, rediscounted a goodly amount of paper for it, and permitted it to overdraw from time to time; the latter, however, only in an emergency and in anticipation of a prompt covering. It may be remarked in passing that the extending of such assistance was a common occurrence during the deflation period, not only with the Trust Company but with all the large banks who were members of the Federal Reserve System. As they needed assistance the Federal Reserve extended it to them, and they in turn extended like assistance as needed to the smaller banks that were not members of the Federal Reserve System. Had it not been for this co-operation, this aid extended by the stronger to the weaker, there would have been a financial panic in 1921 which would have far surpassed that of 1893.

The Central Bank had several correspondents with which it carried active accounts; depositing cash items, borrowing money or rediscounting paper, and drawing upon the balances thus created. Its principal correspondent, however, was the Trust Company, especially during the last of 1920 and the beginning of 1921. During that period there was not a banking day passed that it did not deposit considerable sums with the Trust Company, either by the transmission

of checks, drafts and other cash items, or by the rediscounting of paper, and that it did not draw drafts in considerable amounts upon the Trust Company. It appears, indeed, that while the Central Bank had several correspondents, more than half of all the drafts it drew in settlement of its obligations were drawn upon the Trust Company.

On the 18th January, 1921, the Yakima Hardware Company remitted $47,000 to plaintiff's Seattle office by means of a check for that amount drawn upon the Yakima Trust Company. Plaintiff deposited the check with the Seattle National Bank, and that bank sent the check, together with other checks and cash items, the total amount of which exceeded $51,000, to the Central Bank for collection. The Central Bank was not a member of the Yakima clearing house association, but cleared through the Yakima Valley Bank, with which it carried a balance for clearing purposes. It received the items from the Seattle National Bank on the 21st January, and put them with other items it had for collection through the clearing house on that day, the total amount exceeding $58,000. All these items were collected, but by reason of checks drawn upon the Central Bank and presented through the clearing house on that day, the total amount received by the Yakima Valley Bank for credit to the Central Bank was but $49,000. The Yakima Valley Bank then gave the Central Bank two drafts; one for $45,000 drawn on the Bank of California at Tacoma, and the other for $3,000 drawn upon the Fidelity National Bank of Spokane. The balance, $1,500, the

Central Bank left on deposit with the Yakima Valley Bank. The Central Bank sent the two drafts, together with other cash items, the total of which was $48,500, to the Trust Company for credit to its account. At the same time it sent the Seattle National Bank a draft for $51,000, drawn upon the Trust Company, in settlement of the items the Seattle bank had sent it for collection. This draft was not presented to the Trust Company for payment until 26th January, but the Trust Company was informed on the 25th that such draft had been drawn on it. Prior drafts drawn upon it by the Central Bank had by then come in and been paid, whereby the balance of the Central Bank had been reduced to $24,000. To pay the draft it would be necessary to allow the Central Bank an overdraft of $27,000. Moreover, a number of rediscounted notes, which were secured by the guaranty or endorsement of the Central Bank, were overdue, and under the arrangement between the two banks the Trust Company had the right to charge these back to the Central Bank. After a survey of the situation and a consultation with Barghoorn, the Trust Company decided that it would not pay the draft when it was presented, and so advised him. He immediately went to Yakima to endeavor to secure assistance from the local banks, but as it was found that the Central Bank would need about $100,000 to tide it over its difficulties, he was unable to secure it. The Central Bank closed its doors on the 27th January, and the Seattle National Bank, which had refused to assume responsibility for the collection of out-of-town

items, charged the $47,000 check back to plaintiff's account. Plaintiff then brought this suit against the Trust Company, the Central Bank, and E. L. Farnsworth, the head of the State Banking Department, and as such in charge of the liquidation of the Central Bank. The theory of the suit was that the Central Bank received and collected the $47,000 check as trustee for plaintiff; that in dereliction of its duty the Central Bank sent the proceeds of the collection to the Trust Company instead of transmitting them to plaintiff; and that the Trust Company received the money with knowledge that it was a trust fund, and belonged to plaintiff. The District Court held that plaintiff was entitled to recover the amount of the check, less certain deductions, from the Trust Company, and rendered judgment accordingly. The Trust Company has brought the case here by appeal from that judgment.

SPECIFICATION OF ERRORS

There was error:

I. In holding that the allegations of the complaint were supported by the proof save with respect to the particular manner in which the check of the Yakima Hardware Company was paid.

II. In holding that the transactions between the Central Bank & Trust Company and Spokane & Eastern Trust Company were contrary to sound law and good morals.

II. In holding that the relation of trustee and

cestui que trust subsisted between the Central Bank & Trust Company and plaintiff with respect to the proceeds of the check of the Yakima Hardware Company which the Central Bank collected for plaintiff.

IV. In holding that the relation of trustee and *cestui que trust* subsisted between the Spokane & Eastern Trust Company and plaintiff.

V. In holding that the proceeds of the check aforesaid were traceable as a trust fund in the hands of either the Central Bank & Trust Company or the Spokane & Eastern Trust Company.

VI. In refusing to dismiss the action as against the Spokane & Eastern Trust Company for want of equity.

VII. In rendering a decree for any relief or in any amount in plaintiff's favor and against defendant Spokane & Eastern Trust Company.

VIII. Finally, if it be held that plaintiff was entitled to any relief against the defendant Spokane & Eastern Trust Company, then the District Court erred in not reducing the amount of the recovery by the amount of the drafts drawn upon the Spokane & Eastern Trust Company by the Central Bank & Trust Company and paid by the former prior to the time it was informed of the draft for $51,000 drawn upon it by the Central Bank & Trust Company in favor of the Seattle National Bank, and of the circumstances surrounding the drawing of such draft.

ARGUMENT

I. *The Trust Company was guilty of neither legal nor moral wrong in its relations with the Central Bank. On the contrary, it was generous to the point where generosity came in conflict with sound banking methods.*

Upon reading the above headnote, it will no doubt occur to the Court that the question whether the Trust Company dealt fairly or unfairly, generously or sordidly, with the Central Bank, can have no proper bearing upon the decision of the case. We think it has none, but it was made the basis of the decree appealed from, and so it seems desirable to deal with it before taking up the questions which are really decisive of the case.

When the Central Bank collected plaintiff's check, it intermingled the money collected with its general funds and used it in paying its general debts, a part being applied upon its debt to the Trust Company. In so doing it acted in accordance with the custom of banks and its implied contract with plaintiff. Plaintiff has no cause for complaint, and cannot recover in this action, unless it appears that because of its insolvency the Central Bank was guilty of fraud in making the collection in the usual manner, and that because thereof plaintiff may rescind its contract with the Bank, whereby it became plaintiff's debtor for the amount of the collection, and hold the Bank as trustee *ex maleficio* of the money. Necessarily, therefore,

the decisive questions in the case are whether the Central Bank was guilty of a fraud upon plaintiff, whether because of such fraud it may be held as a trustee *ex maleficio,* and whether the trust fund it received was traced into the possession of the Trust Company. Apparently those decisive questions were lost sight of and not considered by the District Judge. The rationale of his decision seems to be found in these words:

> "Much was said on the argument about the banking laws of the state, the decisions of our Supreme Court, the commingling of funds, and the relations ordinarily existing between different banks in transactions of this kind. But inasmuch as the case will doubtless go to a higher court, I will not discuss these different questions at length. Suffice it to say that after giving full consideration to the arguments of counsel and the authorities cited I am firmly convinced that under the circumstances disclosed by this record one bank should not be permitted to nurse another along in this way until it finds a favorable opportunity to seize the money of some innocent third party to square its accounts, and then abandon its nursling to the tender mercies of bank examiners and receivers. Such a course is forbidden alike by sound law and good morals."
> (Trans., 21.)

Now, the questions of whether the Central Bank perpetrated a fraud upon plaintiff, and whether because of such fraud plaintiff could rescind the contract by which the Bank became plaintiff's debtor, and hold the Bank as trustee instead, are questions of mixed law and fact. Neither the law nor the facts material to those questions were considered. The law

of the case was relegated to a higher court for decision. The facts were no further remarked on than to say that the conduct of the Trust Company in nursing the Bank along for a time and then abandoning it was contrary to sound law and good morals. What relevancy the assumed fact had to the question of whether the Central Bank was guilty of a fraud upon plaintiff is not discoverable. Quite obviously, the decision went off upon a false issue, and in consequence the issues which must be decided if the case is to be correctly decided were overlooked. However, the judgment appealed from rests upon that false foundation, and so we have thought it best to demonstrate the fairness and good faith of the Trust Company in its dealings with the Bank before taking up the decisive questions.

If one may judge from the slighting remark relative to the Trust Company nursing the Central Bank along, the District Judge was under the impression that in extending assistance to the Central Bank under the circumstances here present the Trust Company did an unusual thing, and that its action was induced by some sinister motive. Such notions are pure figments. The evidence is conclusive that the assistance was necessitated by and was given during the deflation period that followed the war inflation; that the larger and stronger banks all over the country, or at least in the extreme northwest, were required to and were extending such assistance to their weaker brethren during that period; that such action was induced by no improper motive, but by a desire to save the

credit of the country; and that the assistance which the Trust Company gave the Central Bank differed not a whit from the aid it gave other banks similarly circumstanced, save that it was, perhaps, more generous. Stevens, a State bank examiner who testified for plaintiff, said that the deflation period in Washington, Idaho and Montana began in the fall of 1920, and was at its peak about the time the Central Bank closed its doors; that it caused prices to drop, money to become scarce, and bank deposits to fall off; that all banks, except those possessing liquid securities, were forced to look to outside sources for assistance; that banks that were members of the Federal Reserve System got assistance there, while the smaller banks looked to the larger banks for aid; that during this period the Trust Company was extending liberal assistance to a large number of banks throughout the Spokane territory; that the extending of such assistance was not only done with the approval of the State banking department, but that under some circumstances it was done at the solicitation of the department; and that the department knew the Trust Company was extending assistance to the Central Bank. He did not recall the amount of loans and rediscounts to and for other banks made by the Trust Company, but knew it ran into a very large sum; perhaps one-third of its total loans. (Trans., 60-61.)

Triplett, a vice president of the Trust Company, testified that during the deflation period it was extending financial assistance in various ways to from 75 to 100 banks, located in Washington, Idaho and Mont-

ana. At the peak the amount it had out in that way was over $3,500,000. The great majority of the banks it assisted weathered the storm, but the Central Bank and some six or seven others did not; notwithstanding the assistance given them they were obliged to close their doors. (Trans., 105-107.) Speaking of the effect of the deflation upon bank deposits, the witness said that at the first of January, 1920, the deposits of the Trust Company were over $15,000,000, while at the first of January, 1921, they were about $11,000,000, and during the month went down to $9,500,000. At the first of January, 1920, country banks had on deposit with the Trust Company over $6,000,000; in the fall of that year their deposits had shrunk to less than $2,000,000. (Trans., 105.) It should be remarked that in November, 1920, the deposits of the Central Bank amounted to $665,000, on the 3rd of January to $513,000, and on the 25th to $426,000. (Trans., 83-84.) Whether deposits were reckoned in millions or hundreds of thousands, the deflation period appeared to have a uniform proportionate effect on them.

The foregoing testimony was not disputed nor in any way questioned, and it proves that the action of the Trust Company in assisting the Central Bank was not only usual during the financial crisis through which the country was passing, but was meritorious, and was approved of, if not solicited, by the State banking department, the department authorized by the laws of the State to approve of that which is sound and honest and condemn that which is unsound and

dishonest in banking methods.

But the District Court thought that the Trust Company abandoned its "nursling" as soon as it found "a favorable opportunity to seize the money of some innocent third party to square its accounts," and it is upon that supposed offense, evidently, that the decree is based. There are two very sound objections to a decree based upon such a theory. The first is that under the pleadings and evidence plaintiff cannot recover unless it has shown that the Central Bank was a trustee for plaintiff, and that a trust fund belonging to plaintiff was turned over by the Bank to the Trust Company. However unkindly the Trust Company may have treated its "nursling," that fact has no bearing on those questions. The second is that the assumed facts are pure fancies. There was neither abandonment of the "nursling" nor seizure of any third party's money. What occurred was that the Trust Company refused to permit the Central Bank to overdraw its account some $27,000, believing such an overdraft under the circumstances to be contrary to sound banking. There was no abandonment, for, as we shall point out later, the Trust Company was willing to continue its assistance under conditions that would insure it against loss. It was justified, both legally and morally, in refusing to take chances in its operations. The country was passing through a critical period financially, and it behooved every bank to adhere strictly to sound banking methods. The Trust Company was assisting from 75 to 100 banks, any one of which had as good a claim upon it as any other.

Its outlay for that purpose was over $3,500,000. In a year's time it had lost $6,000,000 in deposits. On account of those two things alone, then, it had been required to pay out $9,500,000 in money. In addition the banking laws of the State required it to maintain a cash reserve of 15% of its total deposits, and, necessarily, it had to keep itself in such a condition that it could supply the pecuniary needs of its local customers. Its primary obligation, of course, was to its own depositors, and it could justify no action that might, by any possibility, imperil its solvency. Unquestionably it could have advanced the additional $100,000 or more which might have been needed to carry the Central Bank through, and its solvency would not have been impaired although the whole amount had been lost. But no more morally than legally could it be expected to do so. The aggregate of all the demands upon it must be considered in determining how far it ought, in good conscience, to have gone in assisting the Central Bank, and what risks of loss it ought to have taken. The Bank had no better claim upon it than any other country bank, or local customer, who looked to it for assistance from time to time, and it could not properly extend assistance to the Bank which it would not, under similar circumstances, have extended to them. The Bank already owed it $185,000 to $190,000 on direct obligations or guaranties or endorsements of rediscounted paper. A goodly amount of the rediscounted paper was overdue, and under the arrangement between the two banks it could have been charged back to the Bank.

This had not been done because, toward the last, the Trust Company saw no prospect of getting anything better in its stead. The Trust Company was strongly opposed to overdrafts, but nevertheless the account of the Bank was overdrawn, in fluctuating amounts, during the greater part of January. The Bank was slow, especially toward the latter part of the month, in covering the overdrafts, and some of the paper it sent on for that purpose did not appear to be desirable. When the Bank drew the $51,000 draft on the 21st, it made no preparation for covering the heavy overdraft which it knew would result if the draft were paid, nor did it take the precaution to ascertain beforehand whether the Trust Company would permit the overdraft. It was not until the 25th, one day before the draft was presented, that the Trust Company was informed of it. Even then no paper was sent on to cover the overdraft which would result if the draft were paid, nor were there any assurances or promises that it would be promptly covered. On the contrary, the letter which advised the Trust Company of the draft suggested that it might be called upon to advance $50,000 more on paper of a slow nature, and possibly to permit the substitution of "a poorer class of security" for that which it already held. (Trans., 230.) It was because of those conditions that the Trust Company declined to allow the overdraft. (Trans., 113-114.) Adhering to sound banking methods it could not do otherwise. It was willing to continue its assistance to the Central Bank, but only upon condition that it should not be exposed to

loss in doing so. The drawing of the $51,000 draft upon it was, in effect, an attempt to exact a forced loan upon the Bank's own terms. Permission was not sought to make the overdraft, no preparation was made for covering it, the Trust Company was not informed until the day before the draft was presented that such an overdraft was desired. It was placed in a situation where it was required to decide almost immediately whether it would pay the draft and trust to the good will and ability of the Bank to cover the overdraft that would be created, or would dishonor it. Morally as well as legally it was in the right in refusing to be hurried into a $27,000 loan of the safety of which it was not sure.

The District Judge rejected these very apparent reasons for refusing to permit the overdraft in favor of a secret, sordid motive; the opportunity thereby afforded the Trust Company to seize the $48,000 remittance. It is manifest that the evidence was forgotten or overlooked else such a conclusion would not have been reached. One whose purpose is the seizure of money without regard to others' rights may be depended on to make the seizure when the largest amount of money is obtainable. If the Trust Company can be considered to have seized the money in question, it could have got twice as much as it did by making the seizure two or three days earlier. The $48,000 remittance was received and credited to the account of the Bank on the 22nd. The credit extinguished an existing overdraft and gave the Bank a balance of $38,000. During the next two or three

days smaller remittances, and some notes for rediscount, the whole amounting to $5,000 or $10,000, were received and credited to the Bank. During the same period, however, a number of drafts, one for $17,000, drawn by the Bank upon the Trust Company, were presented and paid, so that on the 25th, when the Trust Company decided that it would not pay the draft, the Bank had a balance of but $24,000. (Trans., 111-112, 119.) If the Trust Company was animated solely by sordid motives, its purpose being to seize all the money it could, it is evident that as soon as the $48,000 was received it would have been applied upon the Bank's indebtedness, that the same use would have been made of the smaller remittances received during the next few days, and that no drafts would have been paid. Had that course been pursued the Trust Company would have obtained $40,000 to $50,000 instead of the $24,000 it did get. That it was not pursued is in itself sufficient to prove how wrong the District Court was in the conclusion it reached concerning the transaction.

There are other circumstances which equally relieve the Trust Company from the imputation of sordidness and prove it to have acted in entire good faith. Early in the transactions between the two banks, the Central Bank pledged $20,000 in Liberty Bonds to secure a note it gave the Trust Company. In the latter part of January, when the Bank began to have difficulty in keeping up its cash reserve, the Trust Company permitted the Bank to withdraw the bonds, sell them, and use the proceeds for building up its

reserve. In lieu of the bonds the Trust Company received slow notes as security, many of which were not paid at the time of the trial. (Trans., 107, 118, 136-138.) The exact date of the substitution was not fixed by the evidence, but it was evidently about the 21st. (Trans., 227-228.) It does not need remark that if seizing money was the governing motive of the Trust Company in its dealings with the Bank, it would never have relaxed its grip upon anything so like money as Liberty bonds.

The generous attitude of the Trust Company is exemplified by an incident which occurred just before the Central Bank closed its doors. Stevens, a State bank examiner, reached Yakima for the purpose of examining the Bank on the morning of the 26th. He knew of the outstanding draft for $51,000, and that the Trust Company would not pay it. When he looked at the Bank's balance sheet he saw steps would need be taken immediately to provide money to pay the draft, and he called the bankers of Yakima in conference upon the means for raising the money. They agreed to advance certain sums, enough to take care of the draft but not to permanently relieve the Bank's cash shortage. He then called up the Trust Company and the Bank's correspondent at Seattle to ask them to help. The Seattle bank promised to do something but would not commit itself to anything definite. The Trust Company agreed to advance $15,000. As the Yakima bankers went more thoroughly into the assets of the Bank, they concluded that more money would be needed to relieve its em-

barrassment, probably as much as $100,000, and the examiner called up the Trust Company again to ask it to increase the amount it would advance. It then agreed to advance $20,000. (Trans., 57-58.) Nothing came of this, for the Yakima bankers offers of assistance "petered out," as the examiner expressed it, and the Bank was obliged to close. But the good faith of the Trust Company's offer cannot be questioned and it permits no doubt that throughout its motives were of the best, and that it was willing to do all it safely could to keep the Bank going.

Furthermore, no reason is discoverable for the anxiety of the Trust Company to "square its accounts" which is imputed to it. It need never have permitted the Central Bank to get in its debt, and it was at liberty to refuse further advances whenever it thought the debt was growing too large or the security poor. Early in January the debt was but $142,000, for which, among other securities, it held $20,000 in Liberty bonds. At one time during the month the debt went as high as $212,000, and on the 25th, before the overdue rediscounted notes were charged back to the Bank, it amounted to $185,000 or $190,000. (Trans., 118, 136.) And although the debt was increasing, the Trust Company, for the accommodation of the Bank and to enable it to maintain its cash reserve, permitted the withdrawal of the Liberty bonds and took slow notes in their stead. When the Trust Company had all along been so liberal in its dealings with the Bank, permitting the debt to increase and the security to become impaired, it is unreasonable to assume that

it all at once became obsessed with a mad desire to "square accounts" with the Bank, and was willing to cause its failure in order to get $24,000 in money.

We think, however, that the most complete refutation of the view adopted by the District Judge is found in a number of letters which were introduced in evidence by plaintiff. These passed between Triplett, a vice president of the Trust Company who had charge of its transactions with country banks, and Buckholtz, an employe of the Central Bank. Of Buckholtz' connection with the Central Bank we shall have more to say under subsequent heads. It suffices for present purposes that he was a young man who had been an employe of the Trust Company for several years, and was highly esteemed by its officers. The State banking department disapproved of Ellis, the cashier of the Central Bank, who, by reason of the non-residence of Barghoorn, its president, was virtually its manager. Barghoorn had agreed to get a man to take Ellis' place, and asked the officers of the Trust Company to recommend some one for the position. They recommended Buckholtz, and Barghoorn employed him to go to Yakima, familarize himself with the Bank's operations, and, if he proved efficient, to succeed Ellis as soon as the change could be made without causing trouble. Buckholtz went to Yakima on the 6th January. No official position was given him, but he was put in charge of the credit department, the position he had occupied with the Trust Company. His principal duties were to restrict the making of new loans and enforce collection of old ones; mat-

ters in which Ellis was very lax. Along with these duties he was authorized to select from the paper of the Central Bank such as he thought would be eligible for rediscount with the Trust Company, get information concerning it which would enable the Trust Company to pass upon its eligibility, and forward it to the Trust Company as the Central Bank needed to raise money by rediscounting. While Triplett had been his superior in the Trust Company, and was evidently an older man, they were on very friendly and intimate terms, addressing each other generally as "Dear Trip" and "Dear Buck." The letters on both sides were very frank and aboveboard, it being apparent that the writers expressed themselves freely and without reserve upon the topics under discussion. The matters dealt with principally related to paper offered for rediscount and rediscounted paper that was falling due, but Buckholtz also wrote freely of conditions as he found them in Yakima and in the Central Bank. Prices were falling, farmers would not sell their produce or sold at a loss, and wanted the banks to carry them until conditions got better. Ellis was disposed to yield to such pressure, granted renewals readily and was lax in enforcing collections, and Buckholtz found it difficult to inject the desired stiffening into the credit operations of the Central Bank. To such letters the officers of the Trust Company, principally Triplett but once or twice Mr. Rutter, its president, replied quite fully, expressing their view of the financial situation generally, and the necessity for firmness in enforcing collections and restricting credit.

There are too many of these letters and they are of too great length to permit of reference to them separately. But speaking of them generally, they establish beyond question that while the writers felt that the Central Bank had been too lenient in extending credit and enforcing collections, nothing was needed but more firmness in such matters and some temporary assistance, such as the Trust Company was extending, to tide it over the deflation period. That the Trust Company intended to extend such assistance its officers' letters leave no doubt. In illustration, Buckohltz wrote Mr. Rutter on the 9th January that the withdrawals (of deposits) had ceased, and that if the (farm) products would sell at all at reasonable figures he was confident "that we can get by and liquidate our indebtedness within 90 days." Trans., 148.) Under date of the 10th Mr. Rutter replied, congratulating Buckholtz on the "strong position" he was taking, but cautioning him that banks were passing through a troubled period and firmness in making collections was essential. Of the attitude of the Trust Company it was said: "If your hypothesis is correct there is no question but what we will do our part." (Trans., 53.)

Under date of the 20th January Triplett wrote Buckholtz concerning a particular loan, advising stringent measures to make the borrower pay, and ending in this wise with respect to the general situation:

> "Messrs. Ellis and Barghoorn both seem to feel that if you put on the pressure too hard the borrowers will begin to talk about the bank, and to

some extent we feel they are right—but on the other hand, fear is about the worst thing in the world. It causes a man to neglect his business and to almost crawl into a hole and pull the hole in after him. The fellow who goes on about his business and does what is right, having the diplomacy of which we well know you are possessed, is bound to come out on top, and I have not the slightest idea but that you can pull things out along those lines."

(Trans., 202.)

On the same day Triplett also wrote him as follows:

"I want to again impress upon you the necessity of keeping right on top of these borrowers and not letting them get away from you. We have had so much grief this year that we have come to realize that no dependence can be put in either the market or the predictions of the borrowers. They are all optimistic and seem to feel that as soon as spring opens up things will begin to move, while, as a matter of fact, there is nothing in sight to verify their predictions. Money is tighter than ever, is hard to get; people are not buying anything unless they have to, and that includes food stuff as well as clothing, and we do not look for any decided movement until prices stabilize somewhere, and the stabilization point has not yet been reached. Things may hang around a given point for a few days, but everything is on the down grade and they will go a good deal lower before they come back to any kind of normal basis. Prices have been abnormally high, and they must go sub-normally low before finally adjusting themselves.

* * * * * * *

Your account is overdrawn tonight $7,726.10, and the big Seattle check has not shown up yet. It looks like you will have to pass along a few

more rediscounts."
(Trans., 204-205.)

The "big Seattle check" was the draft to the Seattle National Bank for $17,700 which was referred to in Buckholtz' letter of the 19th. (Trans., 198.)

On the 21st Triplett wrote in three different letters:

"Your account has been credited with $4,411.42 to cover the proceeds of the rediscounts sent in your letter of January 20.

They look better than the average run of notes, and we believe you will be able to work them out. We are not concerned much about Barney, as he seems to have plenty of assets and to be a mighty good customer."

* * * * * * *

"As requested, we are using the notes of B. L. Chaney $1,000 and S. L. Allen $1,934.20 as collateral to your loans in place of the Wapato Construction note $2,500.

* * * * * * *

We could be arrested for what we think of the Allen note. While on paper it sounds good, his statement shows a net worth of such a small amount as compared to what he owes that he seems hopelessly lost in the shuffle. However, for the reason that it has to be done, we are making the substitution for you. Mr. Allen may be able to pay out of his 1921 crop, but all of you fellows who are connected with the Central Bank & Trust Company had better get right down on your knees and start to praying that everything will run along right, or I fear you will never get the money."

* * * * * * *

"Your account has been credited with $10,622.16 to cover the proceeds of the rediscounts sent in your letter of January 19. You have been charged $4,752.48 to retire the note of

> Jerome Lewis, renewal of which was enclosed to you.
>
> * * * * * * *
>
> As to Jerome Lewis—it is one of those things that may take a long time to work out. Under ordinary circumstances we would not be favorable to making such a loan because things are too uncertain, but for the good of your bank the Executive Committee passed it through."
>
> (Trans., 207-209.)

Under date of the 21st Buckholtz wrote a long letter on general conditions in Yakima and in the Central Bank. The effect of it was that all the Yakima banks were carrying a heavy load, but that all were confident "of a good washing out of stuff during the next 90 days" through the sale of farm produce. In the meantime, Buckholtz said, it was going to be difficult for the Central Bank to keep up its cash reserve. He thought that to do so it would be necessary for the Bank to retain collections on hypothecated paper which it made, and to send the Trust Company other paper in lieu of the money. The effect of this, he recognized, would be that the Trust Company would get more and more undesirable paper; in other words, paper which would probably not be paid before the 1921 crops were marketed. The only other way he saw to keep up the Bank's cash reserve was to arrange "the Liberty bond loan in Seattle as we have done with you," *i. e.*, get "Herb" (Herbert Witherspoon, vice president of the National City Bank of Seattle, a bank which had been extending assistance to the Central Bank along the same lines as the Trust Company, albeit not so liberally (Trans., 89), to surrender

the Liberty bonds he held as collateral so they might be sold, and take real estate contracts and mortgages in lieu of them. He closed by saying that "unless you insist, we will continue to hold what few pennies we might collect on your collateral notes and substitute other stuff, which I hope you will O. K. for the present." (Trans., 219-222.)

To this Triplett, writing under date of the 24th (the day before the apocryphal seizure of plaintiff's money), demurred. He foresaw that this would result in the Trust Company's collateral getting "more and more shoddy as time goes on." He thought "Herb" ought to be willing to help the Central Bank out in the manner suggested, and requested Buckholtz to immediately get in touch with "Herb" and ascertain if the latter would not buy the Liberty bonds, which would give the Central Bank $30,000 in money, and accept notes and mortgages as security in their stead. There was, however, no flat refusal to comply with Buckholtz' request in the event that "Herb" proved obdurate. On the contrary, Triplett said that if "he will not do that, get him to purchase the Liberty bonds and send us your note for $30,000 collateralled by one and one-half to one of 'good but slow' paper. What I mean by that, is paper which although it will ultimately be paid cannot be liquidated from so-called quick assets." Expressing the feeling of the Trust Company with respect to continued assistance, it was said:

> "We are willing and ready to stand back of the institution to a reasonable extent, but feel in

so doing we should have a class of paper which will prevent any loss on our part. Many of the notes we have taken on are not up to our regular standard, and it was only because of your judgment after investigating at close range that we were willing to take them. Naturally, we do not want to take any more uncertain paper if it can be helped.

* * * * * * *

It is one thing for us to get behind the bank and another thing for us to take a loss on it. Deposits are bound to slump, but we do not want to be in a position of having to pay them off at a sacrifice to our stockholders.

I mention these things so you will understand that while our feeling is the most friendly in the world and we are willing to do everything we can as long as the stuff is reasonably good, we do not want to get into the position where we will ultimately lose anything."

(Trans. 224-226.)

This last letter was written two days after the receipt of the $48,000 remittance. It is evident that it, at least, was not read by the District Judge. The money which he thought the Trust Company was only waiting "a favorable opportunity to seize" was already in its hands. It did not desire to put any more money into "good but slow" paper; all banks were at that time too much loaded down with that commodity. It had already complained of the character of some of the paper the Central Bank offered for rediscount, although it was accepted in order to aid the Bank. And yet, with the $48,000 in its hands, it was not ready to "abandon its nursling to the tender mercies of bank examiners and receivers," but instead offered to take on an additional load of $30,000 if it was

necessary that it should do so, provided that it was furnished with collateral which was reasonably good, however slow. The generosity of the tone of this letter, and the sincere desire of the Trust Company to continue its assistance if it could be made reasonably safe in doing so, are unquestionable. Entertaining the high opinion that we do of the District Judge, we are forced to the conclusion that he read none of this correspondence; most certainly not this last letter.

Probably this letter will be made the text for questioning the sincerity of the reasons given by the Trust Company for refusing to permit the overdraft, and it will be asked why it was that if the Trust Company was willing on the 24th to make an additional loan of $30,000, it should have refused on the 25th to permit an overdraft of $27,000. Slight consideration furnishes several obvious answers to the question. The first is found in the provision of the State banking code that "Every transfer of its property or assets by any bank * * * made in contemplation of insolvency, or after it shall have become insolvent within the meaning of this act, with a view to the preference of one creditor over another, or to prevent the equal distribution of its property and assets among its creditors, shall be void." Session Laws 1917, pp. 298-99, Remington's Comp. Statutes 1922, §3262. In view of this statute, it is apparent that if the Central Bank was insolvent, and the Trust Company had reason to believe that it was so, yet permitted it to overdraw, afterward getting securities to cover the overdraft, such securities could be recovered by the liquid-

ator of the Bank if its doors were subsequently closed. Now on the morning of the 25th Mr. Rutter received a very pessimistic letter from Buckholtz relating to the Bank's affairs. It appeared from it that unless conditions changed for the better soon the Bank would be in serious difficulty. While Buckholtz spoke of several avenues by means of which the Bank might extricate itself from its difficulties, he said that if all these failed "it sifts itself down to whether you desire by all means to keep this institution open by all possible means, depending more or less on Mr. Barghoorn's personal credit, or whether you have set a limit as to how far you will go." He told of the $51,000 draft that had been sent the Seattle National Bank, said that if it was paid "the overdraft created will be the limit to date of credit advanced this institution," but that "if you do not pay it, we are gone." (Trans., 227-232.) Here, certainly, was food for thought, and the situation received thought. The executive committee met, Mr. Graves, the attorney for and one of the directors of the Trust Company, was called into consultation, and it was finally decided not to pay the draft. (Trans., 122.) Ascribing to Mr. Graves ordinary knowledge of the law and ordinary caution in dealing with situations where large sums were involved, it must be assumed that he advised the executive committee that the letter put the Trust Company upon inquiry concerning the solvency of the Central Bank; that if it was insolvent, and the Trust Company allowed the overdraft, afterward taking securities to cover it, the securities could be recovered

by the liquidator of the Bank if its doors were subsequently closed. The committee, confronted with the alternatives of refusing to allow the overdraft, keeping the Bank open at whatever cost, or losing the securities it received to cover the overdraft in the event of the Bank's failure, prudently chose the first.

Other equally obvious answers are these: There is a vast difference between permitting one to overdraw, trusting to his ability and good disposition to afterward give adequate security therefor, and making a loan upon security which must be submitted and approved beforehand. The Central Bank had been making overdrafts and subsequently covering them with unsatisfactory paper, and the Trust Company did not desire to experiment on so large a scale.

Under the arrangement proposed in the letter, the Central Bank would have got $30,000 in cash without increasing its indebtedness one dollar. It owed the National City Bank $30,000, the debt being secured by a pledge of $30,000 in Liberty bonds. The proposal was that the Trust Company would take over the National City Bank debt, accepting as security therefor "good but slow" paper, and thus release for sale the bonds which were pledged to the National City Bank. If the overdraft had been permitted the Central Bank would still have owed $30,000 to the National City Bank, and would have increased its indebtedness to the Trust Company by $27,000. The amount which a debtor owes affects his ability to pay, and the Trust Company might well be willing to take

on an additional burden of $30,000 if thereby a debt of that amount which the Central Bank owed to another creditor was paid, but be utterly unwilling to assume the added burden if it meant an increase of so much in the total indebtedness of the Bank.

It should be remarked that overdrafts have always been frowned on, by courts as well as by banks. It has been held that allowing an overdraft was a misapplication of a bank's funds, and that a cashier could not justify his allowance of an overdraft by the plea that it was authorized by the board of directors. *Minor vs. Mechanics' Bank,* 1 Pet. 46, 71. Though the practice of paying overdrafts has prevailed to some extent, it is one that should not be sanctioned, for "it has no authority in sound usage or in law." *Lancaster Bank vs. Woodward,* 18 Pa. St., 357. "The bank had no legal right to permit the drawer to overdraw and pay his check out of the funds of other depositors, or the money of the stockholders." *Culver vs. Marks* (Ind.), 23 N. E., 1086, 1089.

There was, manifestly, sound reason, not whim or improper motive, behind the distinction which the Trust Company made between making a loan, secured by collateral, to the Central Bank, and permitting the latter to overdraw.

Something will be attempted to be made, no doubt, of the fact that the account of the Central Bank was frequenly overdrawn during January, and that in some instances the overdraft apparently exceeded that which would have resulted had the $51,000 draft been paid.

The amounts of these overdrafts, as put in evidence by plaintiff, were taken from the books of the Central Bank, and do not prove that the Trust Company actually permitted an overdraft of the amount shown on the Bank's books. The books of the Trust Company and the Bank never corresponded with respect to their balances on a given day; there might be a discrepancy of $25,000 to $50,000 between them. If the Bank on, say, the 7th, drew drafts upon the Trust Company aggregating $50,000, an entry would be immediately made on the Bank's books debiting the Bank and crediting the Trust Company with their amount. If the Bank then had no balance with the Trust Company, the Bank's books would show a $50,000 overdraft. However, the drafts might not be presented for several days or a week or two, and before they were presented the Bank might have made remittances sufficient to cover them, so that in fact there would never have been any overdraft, albeit one was shown for a time on the books of the Bank. (Trans., 43.) An apt illustration appears from the books of the Bank during its last days. They showed from the 22nd to the 27th an overdraft running from $13,000 to $56,000. (Trans., 87.) The books of the Trust Company showed that for the same period the Bank had a balance running from a few hundred dollars to $38,000. (Trans., 111-112.)

But let that pass. With the exception of the overdrafts which were erroneously shown to have existed between the 22nd and 27th, the books of the Central Bank showed no large overdrafts except from the 3d

to the 7th. (Trans., 87.) At that time, however, the Bank's rediscounts amounted to only $115,000, while from the 22nd to the 24th its rediscounts amounted to $190,000. (Trans., 85.) Furthermore, the credit of the Bank was much better during the first part of the month than it was towards the last. The continued shrinkage in deposits, the difficulty it was experiencing in keeping up its cash reserve, and the unsatisfactory paper it was asking the Trust Company to accept for rediscount and to cover overdrafts, necessarily induced caution on the part of the Trust Company in the extension of credit. Obviously, conditions from the 3d to the 7th were so different from what they were from the 22nd to the 27th, that the allowance of an overdraft during the first period would be no criterion by which to determine whether it could prudently have been allowed during the second period.

The offer of the Trust Company, in response to the application made to it by the bank examiner on the 26th, to donate $15,000 to $20,000 to a fund to keep the Central Bank open, may be invoked to cast doubt upon the sincerity of the reasons given for refusing to allow the overdraft. It can have no such effect. While called a donation it would not, of course, have been that, for if the Bank had been rescued and restored to solvency, it would have been obligated to repay all the money advanced to it to effect that result. But had it been an out-and-out donation the Trust Company could well afford to have made it. It would have joined a number of other banks in making up a fund large enough to relieve the Bank from its

present embarrassment not only, but to recoup its losses and put it firmly on its feet, so it would need no further assistance. Had the Trust Company allowed the overdraft, the only effect would have been to relieve the present embarrassment of the Bank, still leaving to the Trust Company, unaided, the burden of carrying the Bank through the deflation period, or else bringing on the same crisis later by refusing assistance. Furthermore, the Bank owed the Trust Company on notes and guaranties of rediscounted paper $162,000; not counting the rediscounts charged back on the 25th, $185,000 to $190,000. (Trans., 136.) If the Bank's losses were recouped by means of the proposed fund, so that it was restored to solvency, the Trust Company would be sure of collecting the debt owing it, otherwise it would have to depend solely upon the solvency of the makers of the paper that it held. The Trust Company was not any too well informed concerning their solvency; indeed, by reference to the Triplett-Buckholtz correspondence it will be seen that it entertained considerable doubt of the solvency of some of them. If it could be made safe on the existing debt, and be relieved from further requests for assistance, it could have well afforded to give, unrestrictedly, $15,000 to $20,000.

Mayhap facetiousness will be indulged in because of the desire expressed in the letter to aid the Central Bank, coupled with the statement that in doing so the Trust Company did not intend to be put in a position where it would sustain a loss. A bank official who felt any other way, especially in a time of

financial distress, should be promptly removed for incompetence, if not dishonesty. He, more than any other, must put justice before generosity. The money he loans is not his but belongs to the depositors in his bank, with remainder over, if any there be, to its shareholders. In a year's time the Trust Company had lost $6,000,000 in deposits. That meant, of course, that it had to keep its cash reserve intact and collect $6,000,000 from its borrowers in order to pay off its withdrawing depositors. In addition it had loaned or otherwise supplied to smaller banks over $3,500,000 and must have had loans to its customers in a much larger amount, for the bank examiner estimated that its loans to banks were about one-third of its total loans. Its officers would have been insane if in every loan they made they had not proceeded on the principle that the bank should not be put in a position where it would sustain loss.

We are impelled to the conclusion that in this case the fine judicial balance of the District Judge failed him, and that he permitted suspicion to take the place of the preponderance of evidence that is needed to sustain his harsh decision. An almost parallel case is found in *Dunlap vs. Seattle National Bank*, 93 Wash., 568, 161 Pac., 364. A trustee in bankruptcy of an insolvent bank brought suit against one of its correspondent banks, alleging that the two banks had conspired to defraud by the correspondent bank advancing money to the insolvent to enable it to keep its doors open and obtain deposits, the deposits being then turned over to the correspondent bank and applied

upon the indebtedness of the insolvent bank to it; it being alleged that more than $200,000 was thus received by the correspondent bank. The only evidence to sustain these allegations was that the insolvent bank was hopelessly insolvent; that the condition of the insolvent bank had been a matter of concern to the correspondent, which knew that if it did not advance money from time to time to the latter it would be obliged to close its doors; that the correspondent did loan the insolvent large sums of money, whereby the latter was enabled to keep its doors open and receive deposits in considerable amounts, much of which was deposited with the correspondent and reduced the indebtedness of the insolvent to it; and that as soon as the correspondent declined to extend further assistance the insolvent was forced to close its doors. It was held that the evidence was insufficient to sustain the allegations of the complaint, the Court saying:

> "The plaintiff, in support of his charge, does not rely upon positive testimony, but upon circumstances, claiming that these establish the charge as made. Fraud cannot be inferred from facts and circumstances lawful in themselves and consistent with an honest purpose. If, when all the facts and circumstances are taken together, they are consistent with an honest intent, proof of fraud is wanting.
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> In *Foster vs. McAlester*, 114 Fed., 145, the circuit court for the eighth circuit, said:
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> 'Fraud cannot be inferred either by the court or jury from acts legal in themselves, and consistent with an honest purpose. The settled rule on this subject is that slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no cer-

> tain results, are not sufficient to establish fraud. They must not be, when taken together and aggregated—when interlinked and put in proper relation to each other—consistent with an honest intent. If they are, the proof of fraud is wanting'."

We would paint no halo around the Trust Company. Undoubtedly business, not sentiment, dominated its relations with the Central Bank. It assisted the Central Bank just as it did many other banks: for business reasons. It did not intend to throw its money away, and expected to continue its assistance only so long as it was reasonably safe in doing so. No one would expect a bank, especially during a financial crisis, to do otherwise. But we challenge plaintiff to indicate a shred of evidence tending to convict it of dishonesty or unfairness. No improper motive can be suggested for it beginning the task of aiding the Central Bank during the financial depression. Certainly no such motive influenced it to continue the task while the demands of the Bank increased and the security it had to offer became poorer in quality. The discontinuance of the assistance was as free from taint. Justice to its depositors, justice to its shareholders, justice to the many other small banks which were depending on it for assistance, forbade that the Trust Company should advance money to the Bank when the latter was disinclined or unable to give adequate security therefor. Had its refusal to allow the heavy overdraft which the Central Bank attempted to fasten on it been prompted by unfairness or sordidness, it would not, just a few days before, have per-

mitted the Bank to withdraw $20,000 in Liberty bonds and substitute inferior security therefor; it would not, the day before, have offered to take over the $30,000 debt to the Seattle bank if "good but slow" paper was given it as security, so that $30,000 in Liberty bonds might be released to the Bank for sale; and it would not, the day after, have offered to contribute $15,000 to $20,000 to a fund which should be sufficient to relieve the Bank from its embarrassment. Most assuredly if its refusal to pay the $51,000 draft was animated by its desire to get some money to apply on the Bank's indebtedness to it, the money would have been taken and applied when it came in, several days before, and not after it had been reduced by more than half by the payment of drafts drawn by the Bank. The evidence permits no other conclusion than that the Trust Company began and continued its assistance to the Central Bank for sound and legitimate business reasons, and that for the same reasons it refused to allow the heavy overdraft which payment of the $51,000 draft would have created. Any notion that the Trust Company nursed the Bank along and finally abandoned it for an improper purpose is the product of sheer, stark suspicion, and is conclusively refuted by the evidence.

II. *The relation between the Central Bank and plaintiff was that of debtor and creditor, and consequently the money which plaintiff seeks to recover was not a trust fund to which it is entitled.*

The Trust Company can only be held liable on the

theory that the Central Bank collected plaintiff's check and held its proceeds as trustee for plaintiff, and that the trust fund thus created was wrongfully turned over to the Trust Company. The evidence establishes that the Central Bank was not plaintiff's trustee for the proceeds of the collection but merely its debtor therefor. That being the case, the money which the Central Bank remitted to the Trust Company on the 21st belonged to the Bank, the Trust Company was at liberty to pay it out on the drafts or apply it on the indebtedness of the Bank, and plaintiff cannot follow and reclaim it.

This is what occurred with respect to the collection of the check: Plaintiff deposited it with the Seattle National Bank, and the latter sent it, together with a number of other checks drawn on Yakima banks, the total of which exceeded $51,000, to the Central Bank for collection. The Central Bank was not a member of the Yakima clearing house, but availed itself of the clearing house facilities by clearing through the Yakima Valley Bank, a member bank. On the morning of the 21st, the date it received the items for collection from the Seattle National Bank, the Central Bank placed those items, together with a number of other checks drawn upon Yakima banks which it held, the total amount exceeding $58,000, with the Yakima Valley Bank for collection through the clearing house. The procedure in collecting through the clearing house was described, though not very clearly, by the witness Lemon. (Tras., 35-40.) Enough appears, however, to show that the Yakima clearing house was of the

usual clearing house type, and afforded a means for the common presentment and exchange of checks and similar obligations held by each member of the association against every other member, and a settlement of the resulting differences in their accounts against each other. 7 Corpus Juris, 896. The usual clearing house procedure is substantially as follows:

> "In practical operation it is a place where the representatives of all the national banks in this city meet, and, under the supervision of a competent committee or officer selected by the associated banks, settle their accounts with each other, and make and receive payment of balances, and so "clear" the transactions of the day for which the settlement is made. These payments may be made in cash or by such form of acknowledgment or certificate as the associated banks may agree to use in their dealings with each other as the equivalent or representative of cash."
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> *Crane vs. Fourth St. Bank* (Pa.), 34 Atl., 296.

For an epitome of the rules and procedure of the Seattle clearing house, doubtless a typical association in the State of Washington, and of the conditions upon which a non-member bank may avail itself of the advantages of the association, see *Moore vs. American Sav. Bank,* 111 Wash., 148, 189 Pac., 1010. Concerning non-member banks generally, see 7 Corpus Juris, 899.

Resuming the narrative, apparently all the items presented by the Central Bank through the clearing house on the 21st were paid. However, checks aggregating some $9,000, drawn upon it and held by other Yakima banks, were presented through the clear-

ing house on the same day, so that as a result of the day's clearings the Yakima Valley Bank received but $49,500 for the Central Bank. Of this amount, $1,500 was left on deposit with the Yakima Valley Bank, and $48,000 was sent to the Trust Company for credit to the account of the Central Bank. In settlement of the collections received from the Seattle National Bank, the Central Bank sent it a draft for $51,000, drawn upon the Trust Company. This draft was received and presented for payment in due course, presentment being made and payment refused on the 26th. The Central Bank closed its doors on the 27th. It was not until after this occurred that any objection was made to the method of collecting and settling for the check that was pursued, and it was sought to hold the Central Bank, and through it the Trust Company, as trustee of the proceeds of the collection.

It should be added that it was not contemplated on either side that when the Central Bank made the collection it should hold the money collected as a special deposit, and remit in specie. It was intended that that should be done which was done, *viz.*, that the Central Bank should commingle the money collected with its own funds, and make settlement by a draft drawn upon some other bank in which it had funds on deposit. The Bank had for some time been the Yakima correspondent of and made collections for the Seattle National Bank. The method pursued in this case was the method invariably pursued in making such collections. (Trans., 41-42.) Indeed, it appeared that from the 17th to the 22nd January the

Central Bank had made collections for the Seattle National Bank amounting to $100,000 (including the one involved), and that settlements for all such collections were made by drafts drawn upon the Trust Company. (Trans., 140-141.)

Moreover, the custom of banks with respect to such matters is so established and well known that every one dealing with them is presumed to have been conversant with and to have contracted in contemplation of the custom, and that the courts will take judicial notice of it. *Bowman vs. Bank*, 9 Wash., 614, 38 Pac., 211, *Commercial Bank vs. Armstrong*, 148 U. S., 50, *First Nat'l. Bank vs. Davis* (N. C.), 19 S. E., 280. Every one knows that out-of-town checks are collected through correspondent banks; that a collecting bank does not collect each check directly from the bank upon which it is drawn and remit therefor in specie, but that all the checks it has for collection are thrown into hotchpotch and collected through the clearing house; that the collecting bank will receive nothing from the checks it presents unless the balance of the day's clearings chances to be in its favor, and in any event will receive nothing but the difference between the amount of the checks which it presented and the amount of the checks which were presented against it; and that therefore remittances to cover collections will be made from the bank's general funds, and not from the specific money collected. What every one knows the courts will judicially notice, so, as above remarked, they will judicially notice the custom of making collections by banks.

Now, whenever it appears, either from the agreement between the parties, or, when there is no special agreement between them, by referenece to the general banking custom, that the collecting bank was not to hold the money collected as a special deposit and remit in specie, but was expected to commingle such money with its general funds and make settlement by means of a draft drawn on another bank, it is uniformly held that when the collection is made the relation between the collecting bank and the customer or correspondent for whom it makes the collection is that of debtor and creditor, and not that of trustee and *cestui que trust.* In *Bowman vs. First Nat'l. Bank,* 9 Wash., 614, 38 Pac., 211, the facts and the opinion of the Court thereon were as follows: Plaintiffs (respondents in the Supreme Court) sent a draft, drawn upon third parties, to the defendant bank for collection. The bank collected the draft, and in settlement sent plaintiffs its draft, drawn upon a New York bank. Before that draft reached plaintiffs, the defendant bank closed its doors, and when it was presented to the drawee, payment was refused. Plaintiffs brought suit against the defendant bank and its receiver, seeking to establish that the money collected was a trust fund. It was held they could not recover; that a trust relation was not involved, but merely that of debtor and creditor:

> "It follows that, in our opinion, the transaction, even if uninfluenced by any action of the respondents after the collection was made, would have established between them and the defendant bank the relation of creditor and debtor, and not

> that of *cestui que trust* and trustee. But, if this were not so, the act of the respondents in receiving the draft, and forwarding it for collection, would clearly show an intent on their part to pass the title to the specie collected to the defendant bank, and accept its responsibility as drawer of the draft of which they were the payees in lieu thereof. They accepted such draft without objection, and disposed of it in the usual course of business, and by so doing put themselves in the same relation to the bank as they would have been if they had forwarded the money, and directed it to send its draft or certificate of deposit therefor."

Another pat decision is *Hallam vs. Tillinghast,* 19 Wash., 20, 52 Pac., 329. The findings of fact in that case were that plaintiff (respondent in the Supreme Court) deposited an out-of-town draft with a bank for collection; that he "delivered said draft to said bank for collection only and for no other purpose;" that he "never deposited or agreed to deposit the proceeds of said draft or any part thereof with said bank;" and that the bank suspended payment a few days after the draft was collected. It was again held that no trust relation was involved, and that the proceeds of the collection could not be pursued as a trust fund.

> "There is no contention that there was any agreement that the particular money should be preserved in specie. In fact, it must be presumed, under the custom stated, that the particular money paid to satisfy the draft was never received by the bank here, as following the custom, the draft would be sent by the bank to its correspondent where the draft was payable, for collection, and, when paid, under such custom the specie would

> not be remitted, but the bank sending the draft would be credited with the amount merely, and such matter left for future settlement in the balancing of accounts. The respondent was bound to know this custom. The fact that he never specially agreed to deposit the proceeds of the draft with the bank made no difference. If he wanted to except it from the usual custom there should have been an agreement that the specific money should be set aside for him, or disposed of in some particular way, or, at least, that upon the payment of the draft a like amount should be segregated from the general funds of the bank and kept for him, thus keeping the proceeds in a special substituted form. Had this been done prior to the insolvency of the bank no doubt a trust would have resulted as against the receiver, if the particular proceeds in either the original or substituted form came into his possession."

In *Commercial Bank vs. Armstrong*, 148 U. S., 50, a bank in Cincinnati agreed to collect items at par for a bank in Philadelphia and remit every 10 days. The Cincinnati bank failed, and the Philadelphia bank filed a bill of complaint seeking to charge its receiver as trustee of the proceeds of sundry collections. The items were divided into two classes. The first included the items which had not been collected when the Cincinnati bank failed; the second included the items which had been collected before it failed. It was held that the plaintiff was entitled to recover on account of the first class, because until a collection was made the relation between the Philadelphia bank and the Cincinnati bank was that of principal and agent. It was held, however, that it could not recover on account of the second class, because the relation of

principal and agent ceased as soon as the collection was made, and the relation of creditor and debtor supervened. Affirming the decision of the Circuit Court, which had held there could be no recovery of the second class on the theory that the amounts collected could not be traced, the Supreme Court said:

> "We think, however, a more satisfactory reason is found in the fact that, by the terms of the arrangement between the plaintiff and the Fidelity, the relation of debtor and creditor was created when the collections were fully made. The agreement was to collect at par, and remit the first, eleventh, and twenty-first of each month. Collections intermediate those dates were, by the custom of banks and the evident understanding of the parties, to be mingled with the general funds of the Fidelity, and used in its business. The fact that the intervals between the dates for remitting were brief is immaterial. The principle is the same as if the Fidelity was to remit only once every six months. It was the contemplation of the parties, and must be so adjudged according to the ordinary custom of banking, that these collections were not to be placed on special deposit and held until the day for remitting.
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> Bearing in mind the custom of banks, it cannot be that the parties understood that the collections made by the Fidelity, during the intervals beween the days of remitting, were to be made special deposits, but on the contrary, it is clear that they intended that the moneys thus received should pass into the general funds of the bank, and be used by it as other funds, and that when the day for remitting came, the remittance should be made out of such general funds."

The principle of the above case was reaffirmed in *Evansville Bank vs. German-American Bank,* 155 U.

S., 556. It was applied in *First Nat. Bank vs. Wilmington Ry.* (C. C. A. 4th Circ.), 77 Fed., 401, and *Richardson vs. Louisville Banking Co.* (C. C. A. 5th Circ.), 94 Fed., 442.

The fact that in the Commercial Bank Case the agreement was that remittances should be made at stated intervals—every 10 days—while in the present case the implied agreement was to remit as soon as the collection was made, does not differentiate the two cases. Unless there is a special direction that the proceeds of a collection shall not be commingled with the bank's funds, but shall be held as a special deposit and remitted in specie, the collecting bank will, under the custom of banks, be merely a debtor for the amount of the collection. *Hallam vs. Tillinghast, supra.* It is the commingling of the money collected with the bank's funds that causes that result, and it is immaterial whether the commingling was for a few hours or a few days. It was remarked in the Commercial Bank Case that it was immaterial that the remittances for the collections were to be made at such short intervals. However, an attempt to distinguish that case because of the agreement that the remitances were to be made at stated intervals was made in *First Nat'l Bank vs. Davis* (N. C.), 19 S. E., 280, where the agreement was that the remittances were to be made immediately. Holding the attempt to distinguish futile it was said:

> "It is true that, in the cases cited above, the contracts provided that the collecting bank should remit, not daily or on the day of collection, but

at stated periods. But we do not think that the difference in the terms of the contracts can make the principles fixed by those high authorities inapplicable here. The test is, did the plaintiff bank agree, expressly or impliedly, that the proceeds of drafts, checks, etc., sent by it to its collecting agent, the Bank of New Hanover, should not be held by the latter as a special deposit, but merely mingled with the other funds coming in and used in the daily intricate payments and collections of its usual business? Such an understanding or agreement does not appear to us at all inconsistent with the expressed stipulation that remittances should be made each day. This stipulation only required that that should be done each day which, under the contracts under consideration in the cases cited above, was to be done, not daily, but at longer intervals. The important point is not, as we have said, where or how often the remittances were to be made, but whether it was understood that the collecting bank could and would transact the business as it did, treating the checks, drafts, etc., sent it as its own in its daily transactions, keeping memoranda or book entries to show how much was due to the plaintiff and to other banks for whom it was doing like services, and then, at a convenient hour and in some convenient way, transferring to the plaintiff bank the money due to it. The manner of keeping the account was immaterial—a mere matter of bookkeeping. If, under the contract, it was not wrongful for the Bank of New Hanover to use money coming to it from the collection of plaintiff's drafts, checks, etc., as its own, and remit other money, or other checks and drafts, to the plaintiff therefor, then it must be that there was no breach of trust or unlawful conversion in the conduct of the officers of the Bank of New Hanover in the conduct of this business for plaintiff. It seems to us plain that both banks must have clearly understood that

> the relation of principal and agent as to any particular check or draft sent for collection ceased just as soon as cash or its equivalent was received by the collecting bank, and that immediately there was substituted for that relation, as to that cash, the relation of debtor and creditor."

At any rate, the decisions of the Supreme Court of Washington bearing upon this subject ought to be followed, especially when there is no conflict between them and the decisions of the Supreme Court of the United States. The Trust Company and Central Bank are both Washington corporations, and plaintiff is domiciled and engaged in business in Washington. All the transactions upon which the action depends occurred in Washington. This Court has undeviatingly held that where a cause of action wholly arose within a given state, and the matters involved were of merely local concern, the applicable decisions of the courts of that state ought to be followed. *Old Colony Trust Co. vs. Tacoma,* 230 Fed., 389, *American Surety Co. vs. Bellingham Nat'l Bank,* 254 Fed., 54, *Columbia Digger Co. vs. Sparks,* 227 Fed., 880. In so holding it is in accord with the Supreme Court. *Sim vs. Edenborn,* 242 U. S., 131, *Bamberger vs. Schoolfield,* 160 U. S., 149, *Detroit vs. Osborne,* 135 U. S., 492.

Plaintiff, we assume, will endeavor to escape the effect of the cited decisions by the claim that the Central Bank was insolvent when it received and collected plaintiff's check, and that consequently it was a fraud upon plaintiff, warranting rescission of the contract between the parties and holding the Bank as a trustee

ex maleficio, for the Bank to make the collection in the manner it did.

That the Bank was insolvent will be conceded. It is evident that it could not have gone through the deflation period, meeting all the demands which would inevitably have been made upon it, without outside assistance. It will be conceded, also, that under certain circumstances the insolvency of a bank at the time it receives a deposit or undertakes a collection is cause for rescinding the contract and holding the bank as trustee. Mere insolvency, however, is not enough to have that effect. The contract cannot be rescinded unless the bank was guilty of fraud in entering into it. The right of rescission in such a case is based, by analogy, upon the right of a vendor of goods to rescind a sale he has made to a trader who is hopelessly insolvent, who knows he cannot and will not pay for the goods, and yet obtains credit for them on the strength of his apparent solvency. It follows that a contract with an insolvent bank cannot be rescinded and it be held as trustee unless it was hopelessly and irretrievably insolvent, and was known by its managing officers to be so, as the result of which they knew when the contract was entered into that the bank could not and would not pay the money which was the subject of the contract. *St. Louis, etc. Ry. vs. Johnston,* 133 U. S., 566. In *Craigie vs. Hadley,* 99 N. Y., 131, a leading case upon this subject, the suit was to recover a deposit made on the 13th of a given month. It was said:

> "The bank was not only irretrievably insolvent, but it had apparently given up the struggle to maintain its credit before the deposit was made. Its drafts had gone to protest on the 12th, and it was manifest that a condition of open insolvency must immediately ensue. The acceptance of the deposit under those circumstances constituted such a fraud as entitled the plaintiffs to reclaim the drafts or their proceeds."

The bank's officers having knowledge, as they of course did, that it must close its doors in a few hours, it was held the contract could be rescinded and the amount of the deposit recovered.

In *Raynor vs. Scandinavian-Am. Bank,* 22 Wash. Dec., 46, deposits were made in the defendant bank on the same day that the bank commissioner (examiner) closed its doors. The Court held that as "the evidence conclusively shows that the bank receiving the checks as a deposit was hopelessly and irretrievably insolvent at that time, and was then known to be so by its managing officers," the bank was guilty of fraud in receiving the deposits which warranted rescission and recovery of the deposits.

In *Furber vs. Dane* (Mass.), 90 N. E., 859, in speaking of known insolvency as a fraud it was said:

> "The effect of this fraud is to make the bank a trustee *ex maleficio.* But the depositor must show that a real fraud has been practiced upon him, and to do this he must show affirmatively both that the bank was actually insolvent when it received his deposit and that its managing officers then knew this to be the fact."

Actual fraud, then, is the touchstone of the right

to rescind, and guilty intent is the touchstone of actual fraud. Good faith is destructive of both, and there can be no rescission if the managing officers of a bank in good faith believed, at the time it entered into a business engagement, that it would be able to respond thereto. The bank may be insolvent, its managing officers may know that it is so, may know that it is in a serious condition, may know that any untoward occurrence or the disappointment of hopes for succor which they entertain will cause it to close its doors, yet if they in good faith believe that it will be able to surmount its difficulties they are justified in keeping its doors open and making the every day engagements of the banking business. If their belief or hope proves unfounded, and the bank is forced to close, persons dealing with it cannot claim a fraud was perpetrated, and hold the bank or its liquidator as trustee.

> "If the president and officers of the bank knew or believed that the bank was hopelessly and irretrievably insolvent at the time of receiving the deposit of the complainant, then a fraud was undoubtedly committed by the bank upon the complainant, for which there should be a remedy. But fraud must be proved, and is not to be presumed, and the burden of proof is on the complainant. The mere fact that the bank was in an embarrassed condition, by reason of the large indebtedness to it from its president, is not sufficient of itself to establish the fraud alleged in this case. A trader, whether a corporation or an individual, may be struggling in the straits of financial embarrassment, but with an honest hope of weathering the financial storm and of being eventually solvent. Property received by such an individual or concern in the ordinary course of business dur-

ing the period of such embarrassment becomes honestly theirs, and the fact that their expectations were unrealized, and their hopes not well founded, would not fasten upon them a fraud that would vitiate their business transactions."

Quin vs. Earle, 95 Fed., 728, 732.

"However, the mere fact that the bank is known to be insolvent at the time the deposit is received is not in our opinion sufficient of itself, without more, to confer this right of rescission upon the depositor, and such right of rescission would not arise when the bank at the time of receiving the deposit, although embarrassed and insolvent, yet had reason to believe that by continuing in business it might retrieve its fortunes; the necessary condition upon which the right of rescission is predicated being that the deposit was received when the bank was hopelessly embarrassed and so circumstanced as to constitute its receipt of the deposit a fraud upon the depositor. See St. Louis Ry. Co. vs. Johnston, *supra*, at pages 576, 577.

In the present case it merely appears that the bank was insolvent at the time this deposit was received, and had been known to be insolvent for ten years previously by the cashier who received the deposit. The extent of its insolvency at that time is not shown, nor is there any evidence as to what subsequent events precipitated the condition which caused its doors to close, or whether or not at the time the deposit was received the bank, although embarrassed and insolvent, yet had reasonable hopes that by continuing in business it might retrieve its fortunes, just as it had previously continued in business for the ten preceding years during which it had been insolvent."

Brennan vs. Tillinghast, 201 Fed., 609, 615.

"The mere fact of insolvency at the time the deposit was received is not sufficient to justify a finding of fraud, but the insolvency must be of

such a character that it was manifestly impossible for the bankers to continue in business and meet their obligations; and that fact must have been known to the bankers, so as to justify the conclusion that the bankers accepted the depositor's money knowing that they would not and could not respond when the depositor demanded it. It is fraud that must be proved. An honest mistake as to the condition of the bank and an honest belief in the solvency of the institution, if it exists, negative the conclusion of the fraud upon which the plaintiff's cause of action must depend."

Williams vs. Van Norden Trust Co., 93 N. Y. Supp., 821, 823.

In a case in which a closely allied question was involved, the Supreme Court has dealt with the effect of actual insolvency upon ordinary banking transactions in the absence of proof of knowledge and intent on the part of the bank's officers. The receiver of an insolvent national bank sought to avoid certain payments and remittances made by it within a few days before its doors were closed, proceeding on the theory that these were transfers in contemplation of insolvency, and so forbidden by §5242, Rev. Stat. There was no question of the insolvency of the bank at the time, and it was insisted that this insolvency must have been known to its officers, and that therefore they intended a preference. Holding otherwise, the Court said:

"It is a matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in

> the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided.
>
> * * * And the evidence fails to disclose any intention or expectation on the part of its officers to presently suspend business. It rather shows that, up to the last, the operations of the bank and its transactions with the Chemical National Bank were conduced in the usual manner. It may be that those of its officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the defendant bank."
>
> *McDonald xs. Chemical Nat'l Bank,* 174 U. S., 610, 618.

For other cases holding there could be no rescission although the managing officers knew the bank to be insolvent, but did not believe it to be hopelessly and irretrievably so, see *Terhune vs. Bank*, 34 N. J. Eq., 367, *Perth Amboy Gas Co. vs. Middlesex County Bank* (N. J.), 45 Atl., 704, *New York Brew. Co. vs. Higgins*, 29 N. Y. Supp., 416, *Stapleton vs. Odell*, 47 N. Y. Supp., 13, *Goshorn vs. Murray*, 197 Fed., 407 (affirmed on this point but reversed on another in 210 Fed., 880).

Under the doctrine of the above cases, it cannot be reasonably contended that the Central Bank was guilty of fraud in undertaking the collection of plaintiff's

check and handling the collection in the customary manner. The manner in which the Bank became insolvent, and the circumstances under which it suspended payment, dispel any notion that its officers then knew it to be hopelessly insolvent, and that it would be unable to pay plaintiff the money collected. On the contrary, the circumstances show that the officers of the Bank did not believe its case to be hopeless until almost the moment that its doors were closed. Here was the manner in which it came to grief: Yakima is a purely agricultural country, and the record shows that the Bank's loans were wholly to agriculturists or to persons whose business was dependent on them. The deflation period caused a contraction of money and shrinkage of bank deposits. The deposits of the Bank declined from $665,753 in November, 1920, to $426,151 on 25th January, 1921. The $240,000 which it was thus obliged to pay out had to be obtained by the Bank from some source. When it endeavored to collect the money from its borrowers it found them unable or unwilling to pay. The same influences which had caused deposits to shrink had caused people to stop buying, so far as possible, and prices to fall. The agriculturists of the Yakima country were either unable to find a market for their produce, or could only dispose of it for ruinous prices. In the majority of cases the Bank was unable to enforce payment, and in cases where it could enforcement would have meant ruin to the borrower. Drastic measures would probably react on the Bank, for the rumor would go abroad that it must be in straits,

else it would not deal so harshly with its customers, and a run on it might result. In any event it was indisposed to bring too much pressure to bear, for its officers, like all other Yakima bankers and business men, shared in the optimism of the producer, and believed that in 60 or 90 days conditions would improve and produce could be moved at a fair price. All these things appear from the Buckholtz letters, of which more will be said hereafter, and which clearly reflect conditions as they were in January.

But in the meantime, as subsequent events show, the Central Bank was slowly bleeding to death. To keep up its credit it was necessary that it should make some loans, there was a steady, if gradual, withdrawal of deposits, and the banking act required it to maintain a cash reserve of 15% of its total deposits. The collections it could make without resorting to unduly harsh measures were insufficient to enable it to meet these demands, so it sought assistance from the Trust Company, Unfortunately, however, the Bank's officers had permitted it to become overloaded with an undesirable class of paper, some of which was uncollectible, and a large part of which was non-liquid, *i. e.*, not capable of being realized on in the desired banking period of 60 to 90 days. As a result, after the Central Bank was in the debt of the Trust Company to the amount of $185,000 to $190,000, and needed still more money to carry it to the improved conditions which the Yakima people were certain was right around the corner, it had nothing to offer except "good but slow" paper, *i. e.*, paper which would not be paid before the

1921 crops were marketed. The Trust Company was exceedingly reluctant to make further advances on such security, but, as we have seen from Triplett's letter of the 24th heretofore referred to, it did agree to make an additional advance of $30,000 on "good but slow" paper. However, the presentation of the $51,000 draft, payment of which would have meant an overdraft of $27,000 with no arrangements for covering it, prevented anything being done with this offer. It was the dishonoring of that draft on the 26th that made the Bank's case hopeless, but even then neither the Bank's officers nor the State bank examiner believed it would be forced to suspend payment. They thought its assets good, albeit slow of collection, and that the other Yakima banks would rather take over slow paper, on which they would not ultimately lose anything, than to permit a bank to close in their midst, with the unsettling of their own credit that would result. It was not until after the Yakima bankers, gathered together in conference upon the situation, had declared much of the Bank's paper worthless, and that no reasonable amount would save the Bank, that its officers and the bank examiner appreciated there was no hope for it. Doubtless the Bank's officers ought to have known the worthless character of much of its paper as well as the other Yakima bankers did after they saw it, but the important fact is that they did not. And it is their ignorance of the true situation that relieves the Bank from the imputation of fraud in the transaction complained of.

Developing the evidence against the fraud theory

step by step, it is first to be remarked that Washington has a complete banking code, and that the State is given plenary power over the supervision and regulation of State banks. The bank commissioner (examiner) is required to visit each bank at least once in a year, and oftener if he thinks necessary, for the purpose of making a full investigation of its condition. Whenever he finds a bank in an unsound condition or doing business in an unsafe manner he is required to close its doors, take possession of its assets, and wind up its affairs, the courts being deprived of jurisdiction to appoint receivers or in any other way interfere with the examiner's control thereover. Session Laws 1917, pp. 272-3, 300-5, Remington's Comp. Statutes 1922, §§3214, 3266-80. An examination was made of the Central Bank in June, 1920. While the examiner disapproved of some of the methods of Ellis, cashier and manager of the Bank, he entertained no doubt of the Bank's solvency, for his suggestions as to its methods were merely in the way of recommendations, which the Bank was at liberty to accept or disregard, as it pleased. In December, only about a month before the Bank's doors were closed, the examiner did request Barghoorn, the Bank's president, to remove Ellis and put another man in his place. Even then the examiner did not regard the situation as exigent, and was satisfied with Barghoorn's promise that the change would be made as soon as a suitable man to succeed Ellis could be found, and the change could be made without causing trouble. (Trans., 62-65.) Owing to rumors relative to the

Bank's condition which had reached the examiner, he went to Yakima to make another examination of it in January, reaching there the morning of the 26th. Before he went he had been informed of the outstanding draft for $51,000, and understood that the Trust Company would not pay it. Knowing this, when he looked over the Bank's balance sheet on the morning of the 26th he saw that the situation was grave, and that immediate steps would need be taken to raise the money to meet the draft. He therefore went to the other Yakima banks to get assistance from them. Representatives from those banks spent the day and night of the 26th, and well into the forenoon of the 27th, in going over the paper owned by the Central Bank, and it was owing to the discouraging view taken by them of its paper that he finally concluded its doors must be closed. Yet he testified that when he began the examination on the morning of the 26th he saw no reason for taking over the institution, and it was only the opinion expressed by the representatives of the other Yakima banks of the quality of its paper that caused him to take that action. He said, however, that he believed that with the amount of assistance suggested (from $75,000 to $100,000), the trouble could have been tided over and the bank have survived, and that in his opinion subsequent developments had shown his belief to be justified. (Trans., 63-64.)

Turning to the officers of the Central Bank, those who directed its affairs, and so were responsible for its continuance in business and the engagement into which it entered with plaintiff, were Barghoorn, its

president, and Ellis, its cashier and, by reason of Barghoorn's non-residence, actual manager. There were a vice president and directors, but they were never mentioned in connection with the Bank's operations, and the evidence shows them to have been merely titular officers, who knew nothing of and had nothing to do with the Bank's affairs. (Trans., 67.) Now, the Bank's failure was caused by a withdrawal of deposits, falling markets and consequent inability to make collections, and an overload of non-liquid and bad paper. The last factor was the one that caused the final crash, for there is no doubt that if the Bank's paper had been liquid, or even good, albeit slow, it would have had no difficulty in obtaining enough assistance from the Trust Company or other banks to keep going. Barghoorn and Ellis knew, of course, of the withdrawal of deposits, the difficulty in making collections, and the consequent embarrassment of the Bank for ready money, but it is evident they did not know of the doubtful quality of the paper it held until the very last; not, indeed, until the other Yakima bankers sat in judgment on it on the 26th and 27th, and condemned much of it as utterly bad. As a result of this ignorance they did not think the Bank was in any danger. They confidently expected conditions would become better; that withdrawal of deposits would cease, markets improve, and collections be easier. But if those things failed them, they entertained no doubt of being able to obtain all the money necessary by borrowing upon collateral or rediscounting notes, for they had no doubt of the quality of the paper they had to offer

for those purposes.

We first take up Ellis, because he was the man on the ground, the man upon whom the chief responsibility rested, for Barghoorn did not live in Yakima and was seldom there. Ellis became an officer of the Central Bank in February, 1920, less than a year before it suspended. He soon incurred the criticism of the State banking department. After the June examination the examiner formed the opinion that Ellis was too optimistic, was not informed concerning the Bank's loans, and that his system of keeping accounts was slovenly. He was inclined to excuse Ellis to some extent because of the short time Ellis had been with the Bank, but wrote Barghoorn calling attention to some of Ellis' shortcomings. In December, about a month before the Bank closed, the examiner again wrote Barghoorn, this time requesting that Ellis be removed. About the same time the examiner chanced to see Barghoorn personally in Yakima, and went over the grounds of complaint against Ellis. These were that Ellis was an optimist; that he overestimated the resources of the Bank; that he did not take sufficient account of falling prices; and that he was disposed to expand rather than contract. In view of falling prices and continued deflation, the examiner thought "a man of far sterner stuff" than Ellis was needed in charge of the Bank. (Trans., 62-65.) Barghoorn expressed a willingness to comply with the examiner's request, but said it would be necessary to clean house gradually; that because of Ellis' wife and children he was loath to discharge Ellis; but that he

was endeavoring to get hold of a suitable man to take charge of the Bank, and as soon as he could do so would put him in Ellis' place. (Trans., 63.) As will be shown under a subsequent head, it was in pursuance of this request from the examiner that Barghoorn soon after employed Buckholtz and sent him to Yakima, intending that he should ultimately take Ellis' place.

Ellis, testifying for plaintiff, said that he knew of the examiner's criticism. While denying, naturally, that he was in any way at fault, he admitted that the criticism of his ignorance of the Bank's loans was justified. He excused his want of knowledge by the fact that he had been with the Bank but a short time, saying that it was utterly impossible for him to familiarize himself with the character of its paper in so short a time. (Trans., 95, 97.)

A strong sidelight is cast upon Ellis' disposition by Buckholtz' letters to the officers of the Trust Company. In a number of incidents Ellis' unquenchable optimism and easy going nature appear. A sale of the Central Bank was in prospect, which would apparently have solved the Bank's financial problems, and Ellis was at all times entirely confident it would go through. (Trans., 148.) Ellis saw advancing prices, good crop movements, and abundant money for the Bank's needs coming in. In trying to arrive at the true situation Buckholtz heavily discounted his figures and took all his estimates with a large allowance of salt. (Trans., 223.) Ellis was inept in the enforcement of collec-

tions. Borrowers whose notes were overdue would receive considerable sums, and notwithstanding the need of the Bank for money Ellis would permit them to renew their notes and use their money elsewhere. That sort of thing became so flagrant that Buckholtz finally took Ellis to task, and strongly intimated that in the future Ellis must not meddle with such matters, but leave them to Buckholtz. (Trans., 184-191.) The letters, in short, show Ellis in the same light that the testimony of the bank examiner shows him, and prove that because of his optimism and easy going nature he did not sense the situation, and had no idea that the Bank was insolvent or in any way embarrassed. The examiner, the administrative officer whom the State had charged with control over the Bank, said that Ellis was incompetent but not dishonest. (Trans., 62.) The courts ought not, on mere suspicion, to override that official's judgment.

Next of Barghoorn. He lived in Spokane, had many other business interests besides his interest in the Central Bank, and was seldom in Yakima. He became a shareholder in the Bank in May, 1919, and its president in January, 1920. Where, as here, a bank's failure is not due to the dishonesty of its officers, but to its inability to realize upon its loans as need arose, knowledge of its insolvency cannot be charged to a particular officer unless he is shown to have known of the character of the loans. In the nature of things, Barghoorn, who had never lived in Yakima, who had been connected with the Central Bank but a short time, and who was not in charge

of its daily operations where he might more quickly have obtained information concerning its borrowers, could have no discriminating opinion of its loans. Of necessity he would have to rely largely, if not wholly, upon the opinions of others. The testimony permits no doubt that Barghoorn believed the loans of the Central Bank to be of a high character, and that, while the Bank was temporarily embarrassed by a shortage of cash, there could be no doubt of its solvency if the temporary trouble was overcome. The bank examiner, who went from Spokane to Yakima with Barghoorn on the night of the 25th, after it was known that the Trust Company would refuse to pay the $51,000 draft, said that from his conversation at that time with Barghoorn he believed Barghoorn "had no suspicion whatever that the bank was going to have to close; that while he was cognizant of the danger of a cash shortage, he didn't question the worth of his assets." (Trans., 64.) At another place in his testimony he said of Barghoorn that "his attitude was more that of fearing a collapse of the credit of the bank and an apprehension over being able to provide cash for the situation, rather than a fear of the intrinsic worth of his assets." (Trans., 65-66.) If such was Barghoorn's point of view on the 25th, two days before the Bank closed, and after he knew that the Trust Company would not pay the $51,000 draft, it is beyond belief that on the 21st, when everything was moving smoothly, he believed the Bank to be insolvent, to say nothing of being hopelessly and irretrievably so.

In speaking of Barghoorn, it must be kept in mind that on the 21st he could have had no inkling of trouble in securing continued assistance from the Trust Company. He was a director of the Trust Company from 1908 until the 11th January, 1921, when he retired of his own volition. (Trans., 49, 122.) His relations with its officers, naturally, were very friendly. It had been exceedingly liberal in its financial aid to the Bank, and it was not to be supposed that it would discontinue that aid so long as the Bank had good paper to offer for security or rediscount. Inasmuch as Barghoorn entertained no suspicion of the good quality of the Bank's paper, it is apparent that on the 21st he expected an uninterrupted continuance of such financial aid from the Trust Company as might be necessary. And it is his expectation or hope on the 21st, the day plaintiff's check was collected, which is determinative of whether there was fraud in the transaction.

Perhaps the most convincing evidence that no one connected with the Central Bank thought it hopelessly insolvent are Buckholtz' letters to the officers of the Trust Company. They have no direct bearing upon the question of whether the Bank was guilty of fraud in that, being hopelessly insolvent, it received and collected plaintiff's check, for Buckholtz was not an officer of the Bank and had no voice in whether it should close or remain open, in whether the collection should be undertaken or refused. His individual opinion concerning its solvency would therefore have no more effect upon the direct question of its fraud

than would the opinion of any mere clerk in the Bank. Moreover, he had been with the Bank less than a month, and his opinion concerning the worth of its assets, and consequently of its solvency, would not have much weight. He was in a position, however, to sense the feeling of the officers of the Bank concerning its condition. He was there to succeed Ellis ultimately, and in the meantime to assist Ellis in conducting the Bank through the deflation period. He saw all that was going on, and if the Bank's officers were apprehensive of its solvency he would have known it. His letters may therefore be said to afford a peep behind the scenes and to disclose what went on in the Bank during the last month of its existence. They are more satisfatcory than any after-the-event testimony would be, for no doubt can be entertained of their sincerity, and that they honestly reflected conditions as he saw them. He had long been an employe of the Trust Company, and was very friendly to its officers. It was upon their recommendation that he had been given the opportunity at Yakima, whereby, if things had gone well, he would have succeeded Ellis as virtual head of the Central Bank. While his letters show him entirely faithful to his new employer, they also prove him loyal to his old employer in all the things of which he wrote. There was no inconsistency in his attitude, for it is evident that Barghoorn did not desire to overreach the Trust Company, or to obtain support from it to which the Central Bank was not properly entitled. From the first, then, the letters show Buckholtz endeavoring to

put matters before the Trust Company fairly. In offering paper for rediscount, he stated its good points, but did not endeavor to conceal disadvantageous features. In speaking of the present and forecasting the future, he wrote freely of conditions about Yakima and in the Central Bank. He told of falling prices, scarcity of money, the difficulty in making collections and keeping up the Bank's cash reserve. Reading the letters in their entirety, no doubt is left in the reader's mind that Buckholtz never, until after the Bank closed its doors, believed it to be hopelessly insolvent, but on the contrary thought that the only difficulty it had to contend with was in keeping up its cash reserve for 60 or 90 days, when, according to the prognostications of all the Yakima wiseacres, bankers and others, crops would begin to move and money and collections be easier. There are too many of these letters to permit of reference to them at length, but we refer briefly to some of them, these extracts being typical of the vein that runs through them all.

It should be premised that it appears from this correspondence that negotiations for a sale of the Central Bank were pending all through the month of January; a sale, it would seem, that would relieve the Bank's (supposedly) temporary cash shortage, and that all concerned in its affairs considered the sale as an alternative relief in the event that business conditions did not improve.

Under date of 9th January, Buckholtz, writing to

Mr. Rutter, president of the Trust Company, said that he was confident "that we can get by and liquidate our indebtedness within 90 days, provided of course that the products held here will sell at all at reasonable figures." Failure to move the products he thought was "not so much a matter of holding for better markets but a matter of light demand temporarily." The matter of making a sale, and Ellis' firm conviction that it would go through, were referred to. The writer said, however, that he was not depending on that in making his forecast, but on the liquidation which he thought would be possible without bringing so much pressure to bear as to do the Bank injury. (Trans., 148.)

Under date of the 17th, in a letter to Triplett, Buckholtz spoke of the marketing difficulties produce growers were having, and the belief of other banks that produce would shortly move and relieve conditions. He said that he was going to keep pounding along, but that "I don't expect to do any great volume of liquidating until February or March. I am figuring on from $100,000 to $150,000 out of hops and apples during the next 90 days. If these two items don't move, we are going to have some mighty hard sledding and it won't be this bank alone." In the same letter he said that deposits were holding up well, and that they expected to get a $50,000 deposit of county funds the last of Febuary or first of March. (Trans., 179, 181.)

Writing Triplett on the 19th, Buckholtz acknowl-

edged the justice of Triplett's criticism, made some days before, respecting the Central Bank's way of handling rediscounts, but said that "no doubt for some weeks it will remain a question of which is preferable to you—overdrafts or past due rediscounts." He proposed a $20,000 increase in rediscounts if the Trust Company would take "stuff that will not be paid until 1921 crop returns are in." (Trans., 198.)

On the 21st he wrote that he had talked with other Yakima bankers, that they also were carrying a heavy burden, but that they were all "more or less confident of a good washing out of stuff during the next 90 days" through miscellaneous crop movement. This, he said, was the only chance "to liquidate our borrowed money down to a reasonable amount and maintain a cash reserve." He closed in a semi-jocose vein by likening the Central Bank to a man at the point of death, but with a hopeful doctor on the job who was able to discern signs of improvement, "and speaking to the patient's wife and children, you would say that he had good chances for complete recovery." (Trans., 219-221.) That he did not intend the comparison to be taken too seriously is evidenced by the fact that two days later, on the 23d, he sent Mr. Rutter a "list of loans which I think can be collected in full during next 90 days aggregating $147,941." This amount, it was stated, did not include "partial reductions on those which cannot be collected in full." From the partial payments he expected an additional $50,000. Ellis' figures, he said, were much more optimistic, but "I have taken con-

siderable salt with his estimates," and the figures given he considered to be conservative. (Trans., 222-223.) And that it was not taken by Triplett to indicate that Buckholtz believed the Central Bank to be in a desperate or even serious condition is proven by the nature of Triplett's reply, written on the 24th, wherein he says that "The patient's friends and family are glad to hear that he is better; that he is no worse, and that he shows good prospects for improvement in the near future." He goes on to say that "this is extremely gratifying," but that the doctor must stay on the job night and day and be prepared for any relapse that may come, at the same time expressing, in the language quoted under the preceding head, the willingness of the Trust Company to stand back of the Central Bank to any reasonable extent if the Bank would furnish the Trust Company a class of paper on which it would not ultimately have to take a loss. (Trans., 224-226.)

In a second and longer letter written to Mr. Rutter on the 23d, evidently intended to give him a full and accurate view of the situation as it appeared to Buckholtz, he began by saying that "The last three days, I have felt very discouraged with the way things are going," and then stated the discouraging factors in detail, among them being the $51,000 draft, of which he spoke as follows:

> "Yesterday, we mailed a $51,000.00 draft on you to the Seattle National Bank covering a large letter of items on other local banks, the net of which has been remitted to you and no doubt we will have a few dollars there to meet it. The

draft will likely reach you Tuesday or Wednesday and if you pay it the overdraft created will be the limit to date of credit advanced this institution. Have Mr. Triplett ascertain the amount of the overdraft created if this draft is paid. If you do not pay it, we are gone."

On the other hand, in the same letter, he said that "business men and bankers here are confident of a good movement (of farm products) during February and March," and that if this occurred "I feel justified in making the statement that I am still confident of cutting down our borrowed money to a nominal amount if not entirely during the next 90 days." Even should the expected crop movement and liquidation fail to occur, and it became necessary for the Trust Company to carry an additional $50,000 of slow paper "which will reach an enormous sum by that time, * * * I believe the possibilities of the institution for future business and earning power to charge off bad paper is here. A bank is needed in this location and a good volume of business is assured, and with close and proper management, there is no doubt in my mind but what the indebtedness carried by the Spokane & Eastern Trust Co. can eventually be worked out and kept within reasonable bounds and worked into a valuable account." Information was asked as to "whether or not you will back the institution and myself any further in case of necessity," and the letter closed with a postscript in which the opinion was expressed that if the Trust Company would advance such additional requirements as might be necessary, which could hardly exceed $50,000 more

at the worst, it would get its money back much more quickly than by letting the Central Bank be closed. (Trans., 227-232.) On the next day, the 24th, in a letter to Triplett the Rutter letter was referred to, and Buckholtz said that "I cannot figure out any chance of keeping the balance in our favor outside of the methods outlined therein." He also said: "Wish you would write me frankly on how the S. & E. feels about things here and whether we can expect you to honor our drafts if the overdraft should go up to $25,000 or a little more, say for ten days or so, and see if something doesn't develop by then." (Trans., 232-234.)

These letters are sincere. They bear upon their face the indicia of honesty. They were written when there was no motive for coloring them or making of them anything but a frank expression of the writer's views and beliefs. And they strip of all pretense to reasonable consideration any claim that on the 21st, the day the Central Bank received and collected plaintiff's check, any one connected with it knew that it was hopelessly insolvent, and that therefore plaintiff would not receive the money collected. The question, be it remarked, is not of what the officers of the Bank might have known, or ought to have known in the exercise of reasonable prudence. It is not a question of incompetence or of negligence but of actual, intended fraud. Only proof of designed fraud; proof that the officers did know, not that they might have known, when they undertook to collect and made the collection, that the Bank was hopelessly insolvent and

that plaintiff would never get the money, will suffice to sustain plaintiff's case. These letters give the lie to the claim that there was knowledge or even apprehension of such a condition. They show Ellis, the man in charge of the Bank's affairs, to have been just such a man as the testimony of the State examiner painted him: illy acquainted with the true character of the Bank's loans, optimistic, inappreciative of the seriousness of the financial crisis through which the country was passing, and without any thought of impending danger. They show Buckholtz, in an endeavor not to be misled by Ellis' optimism, going, as he thought, to the opposite extreme. The Bank had three resources, he considered, to help it through the critical period. The first was the proposed sale. Ellis relied upon this confidently, but Buckholtz put it aside as too uncertain a factor to be depended on. The next was the crop movement in February and March, which all the Yakima bankers and business men expected to occur. If neither of the first two eventuated, then the Bank would have to rely upon the Trust Company to make further advances. No doubt was expressed that the Bank had plenty of good paper to furnish adequate security for such advances; the trouble with it was that it was slow (that is, if the 1920 crop did not move in February or March), and returns could not be expected on it until the 1921 crop. As Buckholtz explained in his testimony, when he spoke disparagingly of the paper it would be necessary to offer for further advances, he did not refer to its ultimate collectibility

but to its want of liquidity; to the inability to realize upon it quickly. (Trans., 128.) It was not until his letters of the 23d and 24th that he expressed any apprehension of danger, and then it was not concerning the ultimate ability of the Bank to pay its debts, but only of its ability to keep up its cash reserve until things took a turn for the better. It must be borne in mind that when those letters were written he had not received Triplett's letter of the 24th, in which it was said that if no deal could be made with "Herb" for releasing the $30,000 Liberty bonds for sale and taking paper in their stead, the Trust Company would take over the debt, if secured by "good but slow" paper, and thus release the bonds for sale. He was, therefore, solicitous to know whether or not the Trust Company "will back the institution and myself any further in case of necessity." It is plain that he hoped, indeed, expected, that it would do so, for he set forth the bright future of the Central Bank if it surmounted the temporary cash reserve difficulty, and the value of its account to the Trust Company. It may be admitted that he was mistaken about the value of the assets of the Bank and the amount that would be required to tide it over, but that is neither here nor there. It is the honest hope or expectation that counts; not the well or ill founded character of the hope or expectation. Banks "may be struggling in the straits of financial embarrassment, but with an honest hope of weathering the storm and of being eventually solvent," and under such conditions "Property received by (them) in the ordinary course of business becomes

honestly theirs." It is not enough to convict them of fraud that "their expectations were unrealized, and their hopes not well founded." *Quin vs. Earle, supra.* In a case where the cashier of a bank had known it to be insolvent for 10 years, it was held that "the mere fact that the bank is known to be insolvent at the time when the deposit is received" is not sufficient to warrant rescission on the ground of fraud; it must also appear that it was hopelessly embarrassed and failure not only certain but imminent. If it "had reason to believe that by continuing in business it might retrieve its fortunes;" if "although embarrassed and insolvent (it), yet had reasonable hopes that by continuing in business it might retrieve its fortunes," there was no fraud, and consequently no right to hold the bank's funds as a trust fund. *Brennan vs. Tillinghast, supra.* "It is a matter of common knowledge," said the Supreme Court, "that banks * * * continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency," there being the hope "that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided." The transactions of a bank doing business under such conditions were not violative of the national banking act although "those of its officers who knew its real condition must have dreaded an ultimate catastrophe," if it did not appear that they intended or expected, at the time of a particular transaction,

"to presently suspend business." *McDonald vs. Chemical Nat'l Bank, supra.* The thing to be ascertained, then, is what the officers of the Central Bank honestly expected or hoped concerning its fate on the 21st, the day the fraud was committed if committed at all. Did they then expect or hope that it would be able to surmount its present difficulties and continue business for some indefinite time; whether long or short is of no moment? Or did they know that it was doomed and must presently close its doors, so that plaintiff would not get its money? If Buckholtz' letters reflect their state of mind, there can be no question but that they expected the Bank would continue business indefinitely, for while in one of his letters written on that day he recognizes the increasing difficulty the Bank is having to maintain its cash reserve, he has various plans for dealing with it, and obviously expects no immediate trouble because of it. That two or three days later he was in a more downcast mood, and thought the Bank must close if the Trust Company would not allow the overdraft caused by the $51,000 draft, is immaterial. Men's moods change from day to day, usually with the state of their digestion or the way they sleep. What we are concerned with here is whether on the 21st the officers of the Central Bank knew it was hopelessly insolvent and would close its doors before plaintiff received its money, or whether they expected or hoped it would remain open for some indefinite time; at least long enough for plaintiff to get its money. We repeat that if Buckholtz' letters are accepted as a reflection of

their state of mind on that day, there can be no doubt that they expected the Bank to remain open for some indefinite time.

It was testified that after the Central Bank closed its doors Buckholtz expressed the opinion that it would not pay more than 30% of its indebtedness. His individual opinion is a matter of no moment, for, as heretofore pointed out, while it was intended that he should ultimately succeed Ellis, he had been given no official position and had no more voice in determining whether the Bank should remain open than any clerk would have. At any rate, what he thought after the Bank closed its doors is no criterion of what he thought before it did so. Subsequent events usually change opinions. Here there was good cause for Buckholtz' change of opinion. In the very short time he had been with the Bank, he could form no accurate opinion of the value of the great mass of its paper. Ellis, who had been with the Bank a year, said that he was not well informed concerning many of its loans because he had not had time to become so, and the examiner excused his ignorance for the same reason. (Trans., 97, 62.) Buckholtz, who had been with the Bank but 20 days, could scarcely be expected to know all about the loans. Just before the Bank closed he got some information concerning them which evidently its officers did not possess. When Stevens, the bank examiner, went into the Bank on the morning of the 26th, he looked at its balance sheet, and saw that immediate steps would need be taken to raise money to pay the $51,000 draft he knew to be out-

standing. He called the Yakima bankers together, and they held a series of conferences, extending through the day and night of the 26th and the morning of the 27th. The note pouch, containing the assets of the Bank, was put before them, and they went through the paper carefully in order to determine how much value was there and how much money would need be raised to tide the Bank over. The more they looked at the paper the less they liked it, and their estimate of the amount of money needed, reasonably low at first, finally reached a point where it was evident that nothing could be done, and that the Bank must close. (Trans., 57-58.) Buckholtz attended all these conferences and followed the estimates of the Yakima bankers. After hearing their estimate of losses, and taking into consideration the Bank's deposits and the amount of paper in the pouch, he thought the Bank would probably not pay more than 30%. He did not recall expressing the opinion imputed to him, but thought it quite likely that he did so, inasmuch as it was in accordance with the idea he formed after hearing the Yakima bankers' estimate of losses on the paper. (Trans., 130-131.)

In considering whether the persons connected with the Central Bank knew it to be hopelessly and irretrievably insolvent on the 21st, and so knowing kept it open, transacting its regular business, for six days longer, it must be kept in mind that a statute of Washington provides that any officer, agent, or employe of a bank who shall accept any deposit, or consent thereto or connive thereat, when he knows or

has good reason to believe that the bank is insolvent, shall be punished by imprisonment for not more than ten years in the penitentiary, or by a fine of not more than $10,000. 1 Remington's Comp. Statutes 1922, §2640. Of course the severity of criminal statutes does not keep men honest, and many bank officers have gone to the penitentiary because of offending against them. In all such cases, however, downright dishonesty, embezzlement or some other form of peculation, lay at the root of the crime. The guilty officers misused the funds of the bank, probably expecting to make the shortage good, but going on from bad to worse until it was impossible for them to extricate themselves. Here the honesty of the officers of the Central Bank is not questioned. No wrongdoing is or can be charged against them, save only that they kept the bank open after they knew it to be hopelessly insolvent. It is inconceivable that men of their standing, innocent of crime or any sort of wrongdoing, would without motive expose themselves to the severe penalties of the statute by keeping the bank open after they knew it to be insolvent.

Summing up, plaintiff cannot recover unless the Central Bank is held to have been a trustee *ex maleficio* of the money received from the collection of plaintiff's check. That cannot be held unless it is said that the managing officers of the Bank were guilty of actual fraud in undertaking the collection; unless it is said that they knew the Bank was hopelessly and irretrievably insolvent, and that when they received the money and sent it to the Trust Company they knew

plaintiff would not get it. The question is not of their incompetence or negligence, of what they ought to have known or might have known. The authorities agree that "It is fraud that must be proved." *Williams vs. Trust Co., supra.* Now, "fraud cannot be established by mere proof of negligence or failure to perform a duty." *Spokane vs. Amsterdamsch Trustees Kantoor,* 18 Wash., 81, 89.

> "Negligence and fraud are not synonymous terms; nor in legal effect are they equivalent terms. Fraud presupposes a willful purpose resorted to with intent to deprive another of his legal rights. It is positive in that the purpose concurs with the act, designedly and knowingly committed. Negligence, whatever be its grade, does not include a purpose to do a wrongful act. It may be some evidence of, but is not, fraud. Gardner vs. Heartt, 3 Denio, 232. Fraud always has its origin in a purpose, but negligence is an omission of duty minus the purpose. People vs. Camp, 66 Hun, 531, 21 N. Y. Supp. 741; Raming vs. Metropolitan Street Ry. Co., 157 Mo., 477, 57 S. W., 268; Cleveland R. R. Co. vs. Miller, 149 Ind. 490, 49 N. E., 445. This distinction was clearly pointed out in Kountze vs. Kennedy, *supra,* 147 N. Y. 129, 41 N. E. 414, 29 L. R. A., 360, 49 Am. St. Rep. 651, the court saying:
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> 'Misjudgment, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit.'"
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> *Reno vs. Bull* (N. Y.), 124 N. E., 144.

The burden, then, is upon plaintiff to prove that when the managing officers of the Central Bank entered into their engagement with plaintiff they knew

that the Bank was hopelessly and irretrievably insolvent, must presently close its doors, and that it would not pay plaintiff the money it collected. The burden is heavier than in the ordinary case, for the sole foundation of plaintiff's case is a charge of fraud. "Fraud," said Mr. Justice Story, "is not presumed. It must at law be clearly and fully established. Suspicion is not enough. Doubtful circumstances are not enough. The balance of the testimony is not to be nicely weighed." *Sanborn vs. Stetson,* 21 Fed. Cas, 314. "Fraud," said Judge Bean in *United States vs. California Midway Oil Co.,* 259 Fed., 343, "is never presumed, but must be established by clear, unequivocal, and convincing proof. Proof which merely creates suspicion is not enough." "Where fraud is alleged it must be clearly and satisfactorily proved by him who alleges it." *Pederson vs. Ry. Co.,* 6 Wash. 202. Fraud cannot "be found upon a bare preponderance of the evidence." *German-Am. Bank vs. Illinois S. Co.,* 99 Wash., 9. The rule is that fraud must "be proved by testimony at once strong, cogent, and convincing." *Morris & Co. vs. Canadian Bank,* 95 Wash., 418. Where circumstances are relied upon to prove fraud, they are not sufficient unless they are inconsistent with honesty, and only consistent with an intent to defraud. If they are of equivocal tendency, as consistent with honesty as dishonesty, fraud is not proven. *Foster vs. McAlester,* 114 Fed. 145; *In re Hawks,* 204 Fed. 309; *United States vs. California Oil Co.,* 259 Fed., 343; *Dunlap vs. Seattle Nat'l Bank,* 93 Wash., 568; *Dart vs. McDonald,* 107

Wash., 537. There is not a scintilla of evidence tending to prove that on the 21st the managing officers of the Central Bank knew it to be hopelessly and irretrievably insolvent, and were aware that in undertaking the collection of the check they were perpetrating a fraud upon plaintiff. The Bank was insolvent, and six days later was forced to close its doors, but those facts, standing alone, do not tend to prove guilty knowledge on the part of its managing officers. They knew that the Bank was having difficulty in maintaining its cash reserve, and probably understood that if conditions did not change and it received no outside aid it might not be able to weather the storm. But they had these resources to look to: (1) The proposed sale; (2) The expected crop movement in February and March; (3) The promised deposit of $50,000 in county funds in February; (4) The continued assistance of the Trust Company. It is of no moment that their hopes and expectations were not realized. If they honestly hoped or expected that the Bank's shortage of ready money would be relieved through these or any one of these avenues of relief, and it would be able to continue business, there was no fraud in the transaction with plaintiff. The evidence permits no doubt that on the 21st they honestly believed that the Bank was in no danger and would continue business indefinitely.

III. *Conceding the existence of a trust relation, the money collected cannot be followed as a trust fund because it was commingled with the funds of the Central Bank, and did not augment its assets.*

To recover in this case, plaintiff must do more than establish a trust relation between it and the Central Bank. It must also show that the money collected augmented the assets of the Central Bank, and can be traced and identified, separate from the funds of the Central Bank. The evidence fails to show this.

For a considerable time (the period is not definitely fixed) the Central Bank had carried an active account with the Trust Company. From day to day, practically every banking day, it would send the Trust Company drafts, checks, and other cash items, to be credited to its account. Also as it needed money it would send notes for rediscount, the amount of which, if accepted, would be credited to it. The magnitude of such transactions is shown by the fact that in October, 1920, it sent the Trust Company cash items (excluding notes or rediscounts) amounting to $421,000; in November, $317,000; in December, $156,000; from the 3d to the 26th January, $151,000; a total of over $1,000,000 for the four months. (Trans., 142.) During January alone it had rediscounts with the Trust Company ranging from $142,000 to over $200,000. (Trans., 118.) The Trust Company was its principal correspondent, more than half of all the drafts it issued being drawn upon the Trust Company. (Trans., 90, 97-98.)

As has been heretofore stated, when the Central Bank received the collection items from the Seattle National Bank, it placed with them other items it held against other Yakima banks, the total exceeding $58,000, and through the Yakima Valley Bank presented them all for clearing. From the amount received through these collections, there was deducted the amount of items presented against the Central Bank, some $9,000, so that the Yakima Valley Bank actually received but $49,500 from the $58,000 in collection items. The Central Bank left $1,500 of this amount on deposit with the Yakima Valley Bank, and sent $48,000 to the Trust Company for credit to the Bank's general account. Before the presentation of the $51,000 draft which the Central Bank sent to the Seattle National Bank in settlement of the collection items received from it, the Trust Company had paid out of the $48,000 remittance a considerable number of prior drafts drawn by the Central Bank upon its general account, so that but $24,000 remained to the credit of the Bank. When it was decided not to allow the overdraft which would have been necessary in order to pay the $51,000 draft, this balance was applied upon a debt which the Central Bank owed the Trust Company.

It is settled law in the State of Washington that in order to recover a trust fund from an insolvent bank two things must concur; the assets of the bank must have been augmented by the receipt of the trust fund, and it must be capable of identification and segregation from the funds of the bank. In *Blake*

vs. State Savings Bank, 12 Wash., 619, 41 Pac., 909, a depositor sought to recover deposits made by him after the bank had become hopelessly insolvent, and was known by its officers to be so. It appeared that the deposits had been received, credited to him, and checked against by him, in the usual way, having thus entered into and become a part of the funds of the bank. It was held that as the "deposits became commingled with the general funds of like character in the bank the means of identification failed and the money could not be reclaimed."

It is evident that the money collected on plaintiff's check was so commingled with the general funds of the Central Bank as to lose its identity. It was put through the Yakima clearing house with all the other checks the Central Bank had for collection on the 21st, a total of over $58,000. In collecting these checks there was deducted from their amount $9,000 on account of checks drawn on the Central Bank and put through the clearing house on the same day. The balance of $49,500 went to the credit of the Central Bank with the Yakima Valley Bank. The Central Bank then drew out $48,000, put it with other funds, and sent the whole to the Trust Company for credit to the general account of the Central Bank. There it was mingled with other funds which had been, and thereafter were, transmitted for credit to the Central Bank, and was subject, and was subjected, to drafts drawn generally against the account of the Central Bank, and to charges on account of overdue rediscounted paper. There was certainly a commingling

of funds and loss of identity equal to that appearing in the Blake Case.

Heidelbach vs. Campbell, 95 Wash., 661, 164 Pac., 247, is not a bank case, but is squarely in point on the effect of commingling funds. Goods were sent to a merchant to be held by him in trust, with the privilege of sale and requirement of accounting to the owner for proceeds of sales. Some of the goods were sold, but the trustee did not keep the proceeds of the sales separate from his funds. Instead he commingled them therewith, and used them in payment of employes and other running expenses, in paying his creditors, and in the general operations of his business. It was held that the trust fund had lost its identity and could not be traced.

In the case at bar there is the same commingling as in the cited case. The Central Bank put the proceeds of the collection with its general funds, and used them in payment of its debts.

The Washington cases heretofore cited have denied the right to recover a trust fund because it was commingled with the funds of the trustee. Those hereinafter cited deny the right because there was no augmentation of the assets of the trustee. In *Rugger vs. Hammond,* 95 Wash., 85, 163 Pac., 408, the owners of bonds authorized their sale and the remittance of their proceeds to a designated bank. One of the owners instructed the bank to use his portion of the proceeds, when received, for a particular purpose. The bank did not do so, but so disposed of them that

they were lost to the owner. He sought to follow the money as a trust fund in the hands of the bank's receiver. Denying him that relief, these rules were stated by the Court: (1) In such a case, a question of title to property, not of debt, is involved, and the claimant cannot prevail unless he can trace his property into the possession of the receiver of the insolvent bank; (2) The burden of proof is upon the claimant, and "it must clearly and satisfactorily appear that his money or property sought to be recovered is actually, in its original or substituted form, in the hands of the successor of his trustee;" (3) There could not be a recovery without showing that the bank's assets were augmented by the reciept of the trust fund; (4) The fact that the money was deposited with the bank, and was mingled with its funds and used in the usual course of its banking business, was insufficient to establish an augmentation of its assets.

Next in order is *Zimmerli vs. Northern Bank,* 111 Wash., 624, 191 Pac., 788. There bonds secured by a mortgage on realty were executed to a trust company. It sold two of the bonds to plaintiff. Subsequently a purchaser of the realty paid the entire mortgage debt to the trust company, which thereupon satisfied the mortgage, but did not pay the amount of his bonds to plaintiff. The purchaser of the property and plaintiff were both depositors with the trust company, and the mortgage debt was paid by a check drawn upon the purchaser's account with the trust company. The trust company became insolvent, and

plaintiff sought to establish that the money paid in satisfaction of his bonds was a trust fund, and to recover it from the company's liquidator. It was held that there had been no augmentation of the bank's assets, and therefore there was no trust fund.

In *Spiroplos vs. Scandinavian-American Bank,* 116 Wash., 491, 199 Pac., 997, we have a case that cannot in any way be distinguished from the case at bar. On the 12th January, 1921, the plaintiff bought from the defendant bank a draft upon the National Bank of Greece. Neither the defendant nor its New York correspondent was a correspondent of the Greek bank, so to provide funds for the payment of the Greek draft, the defendant drew a draft for the same amount upon its New York correspondent in favor of the New York correspondent of the Greek bank. The money paid by the plaintiff for the Greek draft went into the defendant's general funds. Three days after the purchase of the draft, on the 15th, the bank commissioner (examiner) declared the defendant to be insolvent, and took charge of its affairs for liquidation purposes. When the draft was drawn, the defendant had a sufficient balance with its New York correspondent to pay the draft, but after it closed its doors the New York correspondent refused to pay the draft and applied the balance on claims it had against the defendant. The plaintiff thereupon sought to establish the money he paid for the draft to be a trust fund, and to recover it as such. It was held that he could not recover because there had been no

augmentation of the defendant's assets. Quoting from the opinion:

> "It may be assumed that Spiroplos' money passed into the hands of the receiver in a substituted form, but the more serious question is whether it increased the net assets of the bank. The receiving of money on deposit by a bank does not ordinarily swell its assets because it creates a debt of the bank to the depositor equal to the amount of the money so received. In the *Rugger* case it was said, speaking of the money there involved:
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> 'True this money in a sense went into the assets of the trust company, but so does all money which is deposited in a bank, since title thereto passes to the bank. It is not enough, however, for our present purpose that the money physically became a part of the trust company's assets, it must have actually swelled the net assets of the trust company and passed in some form to the hands of the receiver. Manifestly the receiving of money on deposit by a bank does not ordinarily swell its assets, for it creates a debt of the bank equal to the amount so received.'
>
> The question then arises whether, when the bank received Spiroplos' money and issued the draft, it created an obligation on the bank equal to the amount of money so received. If it did, the rule of the cases just cited would control."

The Court then considered that question, and held that when the bank issued its draft it incurred a debt to plaintiff, and the "net assets of the bank were not augmented by the transaction."

The rule stated in the Spiroplos Case has been somewhat weakened by the opinion in the later case of *Raynor vs. Scandinavian-American Bank,* 22 Wash.

Dec., 46. The Spiroplos Case required that there should be an augmentation of the net assets of the bank. The Raynor Case held it was suffiicient if the gross assets were augmented. Both are department decisions, and at the time of writing this brief the Supreme Court, sitting *en banc,* has not harmonized them. In view of that situation, we shall not remark upon either, but shall pass to the Federal decisions.

In *City Bank vs. Blackmore* (C. C. A. 6th Circ.), 75 Fed., 771 (opinion by Judge Taft), the City Bank sent a New York draft for $5,000 to the Commercial Bank, for credit to the account of the City Bank. The Commercial Bank was then hopelessly insolvent, due to the dishonesty of its cashier and managing officer, and closed its doors three days later. Upon receipt of the draft the Commercial Bank sent it to the National Bank of the Republic, at New York, which credited the draft against a debt due it from the Commercial Bank. The City Bank sued to establish and recover the amount of the draft as a trust fund, asserting that a trust relation existed because of the hopeless insolvency of the Commercial Bank, known to its managing officer, when it received the draft. It was held that although a trust relation existed, there was no trust fund to be recovered unless it appeared that the assets of the Commercial Bank were increased $5,000 by the credit given it on the books of the National Bank of the Republic, or unless the claims against the Commercial Bank were decreased $5,000 by reason of the credit, so that there was $5,000 more for distribution among its creditors.

That, of course, did not appear. The Commercial Bank received $5,000, but incurred an indebtedness to the City Bank of the same amount. It used the $5,000 to pay a previously existing debt to the National Bank of the Republic. At the end of the transaction it was financially where it was at the beginning. Its assets had not been increased or its debts decreased by one dollar. The lessening of its debts to the National Bank of the Republic had been offset by a similar increase of its debt to the City Bank; in other words, there was merely a substitution of one creditor for another. It was therefore held the City Bank could not recover.

The similarity of the cited case to the case at bar is striking. The Central Bank received $48,000 in money and in doing so incurred an indebtedness exceeding that amount. It used the money so received to pay previously existing indebtedness, the result being that through the transaction it did not add one dollar to its assets or decrease its indebtedness by one dollar. Nothing more was accomplished than to pay one creditor by incurring an indebtedness to another.

In *Empire State Surety Co. vs. Carroll County* (C. C. A., 8th Circ.), 194 Fed., 593, many different questions concerning trust relations and trust funds were involved. Among other things, it was held that "the deposit of checks of third persons which are credited to the depositor and used by the bank to pay its debts bring no money into its fund of cash and form no

foundation for preferential payment to the depositor" —citing *City Bank vs. Blackmore, supra.*

In *Wuerpel vs. Commercial Bank* (C. C. A., 5th Circ.), 238 Fed., 269, a mercantile house assigned an account against a customer to a bank as collateral security for a debt owing to the bank. The customer paid the account to the mercantile house, which thereupon used the money in paying creditors other than the bank. The mercantile house becoming insolvent, the bank sought to establish and recover the amount of the account as a trust fund. It was held that there could be no recovery because the insolvent estate was not augmented by the fund sought to be recovered. Quoting from the Court's opinion (pp. 274, 277):

> "It is not claimed that the proceeds of the draft went into the purchase of new goods, but, on the contrary, that they went entirely to reduce existing obligations. That this was a benefit to the bankrupt is obvious. The test, however, is whether it was of interest to the general creditors, by swelling the fund or assets that came to the trustee for distribution among them. If new goods had been bought by the bankrupt with the proceeds of the draft, which went into its general stock, and presumably remained there till surrendered to the trustee, or if there had remained, at all times till bankruptcy intervened, a balance to the credit of the bankrupt, at any or all of the banks with which it did business, an amount in which the proceeds of the draft might be represented, an augmenting of the assets that came to the trustee would be shown. The stipulation and record affirmatively show that no such use was made of the proceeds of the draft, but that, on the contrary, they were used exclusively to pay existing obligations, and added

nothing to the property or money that went to the trustee in bankruptcy.

* * * * * *

The general doctrine that the estate in insolvency must have been augmented by the fund sought to be recovered is well settled, and seems not to be disputed. Its application to the facts of this case is the disputed question. The authorities cited are most in point upon the proper application of the rule to the facts shown by the records. Following them, we think that the record affirmatively shows that the insolvent estate, which was to be administered in bankruptcy for the benefit of the creditors of the bankrupt, did not profit from the proceeds of the converted draft in any respect, and that when this affirmatively appears the injured or defrauded party is no more than an unsecured creditor, entitled to no priority, since it is not the character of the wrong done him alone, but also the fact of advantage received by other creditors thereby, that entitles him to such priority."

In *Knauth vs. Knight,* 255 Fed., 677, an insolvent firm daily overdrew their account with a bank in large sums. These overdrafts were secured by pledged collaterals, and at the close of the day's business the firm would deposit enough money to cover the day's overdrafts. The money necessary for that purpose was obtained from plaintiffs (among others) by the issuance of fictitious bills of lading, which were attached as security to drafts which were discounted or sold. Plaintiffs elected to rescind the fraudulent transactions by which their money was obtained, and sought to follow as a trust fund the securities which the bank held as collateral for the overdrafts, and which, after the bank's claim had been satisfied, had

(Testimony of B. J. Ellis.)

which I did not create and had no control over. As I recall it, during the period I was in there the maximum loans of the bank were about $650,000; that was the peak they reached during that period; the loans were about $508,000 when I went in; they were $552,000, about, when I quit. Among the increase of loans was one of $11,000 to the Frank Investment Company and one of $5,000 to Ross & Fisher, of which Mr. Ross, the vice-president, is a member, and $12,000 to another director, Mr. Woodcock. The witness further testified that he remembered when the cash letter came in from the Seattle National Bank containing a check for $47,000 in favor of the plaintiff; that the letter either arrived at the bank on the afternoon of the 20th or the morning of the 21st; that he talked with Mr. Buckholtz in regard to the cash letter; that it was discussed as usual. Buckholtz and the witness consulted concerning both incoming and outgoing cash items and clearings, and the particular letter was discussed in the usual manner and probably a little more at length, owing to its unusual size; that Buckholtz saw it and the items; that the drafts which were received through the clearings were sent to the Spokane & Eastern because it was the principal and drawing correspondent, and the only time the Central Bank didn't use them in the ordinary course of business was when the remittance was in the extreme east or in [72] California; that in the particular instance Buchholtz and the witness discussed the matter at some length and decided to

(Testimony of B. J. Ellis.)

send it to Spokane. The reason therefor the witness could not state specifically other than that they thought it was regular and drawing on them in settlement of the Seattle letter would avoid, as Buchholtz said, a transfer from some other account to the Seattle National, and would apparently swell the balance at Spokane for a few days.

On cross-examination the witness testified that Mr. Buchholtz didn't have charge of the whole of the credit department; that Mr. Buchholtz and he and the loan committee had charge of that; that Buchholtz had charge of it jointly with him; that in the time that witness had been with the bank prior to the examination made in the last part of June, 1920, he did not have time to entirely familiarize himself with the condition of the bank's paper; that that was necessarily so. He further testified that from the 1st of October and before that time, all items of any consequence, unless they went to the far east or to California, were deposited with the Spokane & Eastern; that the instructions were that the Spokane & Eastern was to have practically all of the business, and that all drafts in payment of whatever the bank had to pay were drawn upon them in that territory, except that Frisco was used for California business and that the National City Bank of Seattle was used for some of the western business; and that the National City Bank was quite actively used at times as they handled the Canadian stuff for the Central Bank; that during that period the custom was, in making

(Testimony of B. J. Ellis.)

remittances to the Seattle National, that about one-half of the settlements would be by drafts drawn on the National City Bank, or possibly not a half, and the other would be by drafts on the Spokane & Eastern; that he sent all the Yakima Valley drafts to Spokane for deposit, and drawing a draft in favor of the Seattle National against the Spokane & Eastern was not irregular, and that it was within the ordinary course of business as it had been transacted to draw it either there or on the National City Bank; that it would not have been sent to the Seattle National Bank in any case because the Seattle National was not a [73] drawing correspondent, a nominal balance only being carried there. While it might not have been out of the ordinary to have done it in this instance, it had never been done and in that sense would have been out of the ordinary.

On redirect examination the witness testified: That it was not a question of drawing on the Seattle National Bank. The Central Bank had the funds in transmittable form; that it was the purpose of the Central Bank that the Seattle National Bank should receive them, but instead of doing it directly, they did it indirectly by sending them to Spokane; that after Mr. Buchholtz came, witness carried on no correspondence with the Spokane & Eastern, but Buchholtz did it all; prior to Buchholtz' arrival witness had occasion to write the Spokane & Eastern almost daily in the regular course of business, but that he wrote no letters after Mr. Buchholtz came.

Testimony of W. L. Nossaman, for Plaintiff.

W. L. NOSSAMAN testified that he was in Yakima on the 27th January with Mr. Miner for the purpose of reporting on conditions to Mr. Spangler, president of the Seattle National Bank; that he asked Mr. Buchholtz for an estimate as to what the Central Bank would pay, and Buchholtz said he didn't think it would exceed thirty cents on the dollar. Witness also remarked something to Mr. Buchholtz that it seemed to him that the Spokane & Eastern would not have appropriated the money if it knew of the outstanding draft of $51,000, and Buchholtz said they did know of it; he didn't tell witness how they had the information.

Testimony of Harry Coonse, for Plaintiff.

HARRY COONSE testified that he was in charge of the affairs of the Central Bank & Trust Company as liquidator, and in his opinion it would pay between thirty-five and forty cents on the dollar. [74]

DEFENDANTS' EVIDENCE.

There was introduced in evidence a copy of the complaint in an action pending in the Superior Court of the State of Washington for Yakima County brought by the Seattle National Bank against the Spokane & Eastern Trust Company, Central Bank & Trust Company and John P. Duke, as supervisor of Banking. The action was one brought by plaintiff as trustee for various depositors to recover the balance of the items in-

(Testimony of W. T. Triplett.)

cluded in the remittance letter of 19th January, 1921, the complaint being similar in form and theory to the complaint in this action.

Testimony of W. T. Triplett, for Defendants.

W. T. TRIPLETT testified that he was a vice-president of the Spokane & Eastern Trust Company and a member of the board of directors and of the executive committee; that previous to 18th January, 1921, he had been secretary, and had a long experience in various positions in banking houses; that during the period under inquiry here he had charge of the relations with the country banks who kept accounts with the Spokane & Eastern, or had other kinds of dealings with it; that it had been the policy of the Spokane & Eastern Trust Company for a great many years to build up its country bank business by rendering assistance in furnishing employees to the country banks; that country banks often asked the city banks to recommend someone for a position in such banks and that the Spokane & Eastern at times recommended its own employees for such positions if they were good men, thinking that they would become, in time, officers of the bank and would retain a friendship for the Spokane & Eastern Trust which would build up business between the two banks. The witness then gave twenty-four cases where, upon the request of sundry country banks it had recommended men for employment during a considerable number of years, and stated that in practically every instance it had

(Testimony of W. T. Triplett.)

resulted in cementing the friendly relations between the banks. Five of the cases were recommendations of men then in the employ of the Spokane & Eastern Trust Company. That he has not mentioned a great many who were sent out and proved unsatisfactory. Speaking of the specific instance of the Central Bank and Mr. Buckholtz, the witness testified that Mr. Barghoorn had informed the witness that he was contemplating a change in the Yakima bank and asked witness if he knew [75] of anyone competent to take the place.

The witness continued: Barghoorn stated that he wanted a man who was peculiarly fitted to look after loans and manage a bank in a town the size of Yakima and who was capable of building up a business. Mr. Barghoorn was frequently in the bank, being a member of the board of directors of the Spokane & Eastern at that time, and would ask me if I had got him a man yet. I sent up several who had come in to us from outside banks where business was contracting, but he did not take any of them because we were not in a position to recommend them as he wished them to be recommended. Finally, I had a talk with Mr. Rutter and we decided that if Mr. Barghoorn wanted to negotiate with Mr. Buckholtz that we would let him do so. We did not like the thought of Mr. Buckholtz leaving our employ, but we thought it might be a good thing for him as it looked at that time as if the Central Bank was a nice opportunity for a young man in a growing town like Yakima. I sent Buck-

(Testimony of W. T. Triplett.)

holtz up to Mr. Barghoorn's office, telling him that Barghoorn was looking for a man to go to Yakima and ultimately succeed Mr. Ellis as cashier of the bank and that we had recommended him for the position. Later in the day, Buckholtz said to me that he had decided to take that position and asked when he could get away, and I said "To-night if you want to," and he went away that night. Within my knowledge and my contemplation there was no sort of a string to that employment of Buckholtz nor any sort of understanding, express or implied, that he was to be the agent of the Spokane & Eastern. He left our employment at that time, and in accordance with my usual custom I notified the comptroller's department that he was off the pay-roll. There was some salary coming to him for a few days in January, and he afterwards requested the comptroller to send the balance that was due him to his wife, which was done. Speaking for myself, I have told everything that occurred between myself and Buckholtz respecting this employment. We made no arrangement with Buckholtz to send to him for collection notes which were held as collateral for indebtedness of the Central Bank to us. It was discussed in our Executive Committee and we decided that it was all right for Mr. Buckholtz to have those particular notes. We were aware that Mr. Buckholtz was ultimately to succeed Mr. Ellis as cashier of the bank, and Mr. Ellis, with all due respect, did not handle our rediscount notes in the way we thought he [76]

(Testimony of W. T. Triplett.)

ought to. The statements that he sent to us with the notes showed that many of the borrowers had produce which they could sell by the time the notes came due and pay the notes off, and we would charge their accounts with the notes at maturity and send them down there expecting they would be paid and the rediscount liquidated, but instead of that we found he took renewals of them. Of course they were his notes when they were charged to his account and he could do what he pleased with them, but when he resubmitted them to us with ninety days additional time, we didn't like it. Knowing Mr. Buckholtz' confidential position there with Mr. Barghoorn, we had no hesitancy in sending them to him, but we didn't want Ellis to get hold of them. From that time on, they were sent to him individually; that arrangement had no relation to anything that was done before he went away, but had its origin after he had gone to Yakima. It had its origin solely and exclusively in the conversation and correspondence to which we have referred and was solely for the purpose stated. After the Central Bank closed, Mr. Buckholtz called me up, or I called him up, and he said, "the bank is closed," and I said to him that I supposed he was footloose and he said "yes." I said that I had a job for him; that I wanted him to take possession of all the notes and collateral we had down there and look after our interests in Yakima, and he did that for a day or two, and then we had another conversation and I told him to

(Testimony of W. T. Triplett.)

gather up all our collateral and bring it to Spokane, which he did. When he came back to Spokane we discussed his future and decided we needed him in Yakima to look after the items that he had in his possession, and he has been so occupied since that time except an occasional few days when we would send him out to some correspondent bank to go into their affairs with them. Mr. Buckholtz has been in our employ off and on since 1914, and Mr. Rutter and I always looked on him as our prize man; one of the coming young fellows of the bank; and we hated to see him leave the bank for we knew that he would develop into something better. Buckholtz had been out of our employ two or three times since 1914. He went to St. Joe, Idaho, and was cashier of the bank there for two years; absolutely disconnected from us. After that he came back and entered our employ. The Idaho bank was a small bank where there wasn't much opportunity for him to get credit experience [77] which he was desirous of getting, and we finally gave him a position in connection with our Credit Department. Later on, he went to Coos Bay in the employ of a bank there, but some time afterwards he came back to us and we hired him again. With these exceptions he has been in our employ since, although he might have gone out to relieve someone for a week or so in other banks. During his connection with the Coos Bay and Idaho banks, he had no connection whatsoever with us. The peak of the deposits of the Spokane & Eastern

(Testimony of W. T. Triplett.)

Trust Company was on 31st December, 1919; they amounted at that time to fifteen million and some hundred thousand dollars. They commenced to decrease after that. In January, 1920, I think our deposits were running $11,000,000. Some time in January, 1921, they shrunk to $9,400,000, or a shrinkage of some $6,000,000 in a period of little more than a year. This decrease was caused by the general change in financial conditions. Some of the banks suffered likewise and some did not. At the present time our deposits are somewhat over $9,000,000. The changes I have mentioned are just in the ordinary course of business. As an illustration of how deposits decreased: December 31, 1919, country banks had on deposit with us more than $6,000,000; last fall their deposits were less than $2,000,000. We have always rendered more or less assistance to country banks, but especially beginning in the latter part of 1919. The territory over which that assistance extended was from Tacoma on the west to Forsythe, Montana, near the Dakota line, on the east, and from Republic, Washington, down as far as Hollister, Idaho, which is near the Utah line. I am not prepared to give you the exact number of banks we were assisting in one form or another during that time, but it was more than seventy-five and less than one hundred. We would lend them on bills payable secured by collateral; we would rediscount their customers' notes with the bank's endorsement; we would sometimes buy notes outright from them that they wanted

(Testimony of W. T. Triplett.)

to sell so they would not have to endorse them, and there were times when we loaned directly to the bankers, that is, to the men instead of the banks. I don't know the date exactly, but I think the peak of our assistance in that way was in the midsummer of 1920, when we had a little over three and a half million dollars that we had loaned to country banks. It has now gotten [78] down to about $1,280,000. In July, 1921, it was $2,600,000 and has been going down since just in the ordinary course of dealing to the figure mentioned. There has been no change in our policy. I think we first began to render assistance to the Central Bank in the spring of 1920. I do not recall the particular circumstance except they applied for credit in the usual way, and we decided to carry some rediscounts for them. From that time on, it continued as shown by the exhibits and by the evidence here. We had no different arrangements with them than we had with other country banks. At the peak the total sum we had invested in assisting the Central Bank was $212,000. When its doors closed, the amount was less than that, but I haven't the figures here. This was a large sum, but we had a great many other exceptions along the same line. We had a bank at Moscow we loaned over $100,000 to, including loans and rediscounts; one at Waterville, more than $175,000; a little bank at Almira, about $85,000; a bank at Republic, $75,000; a bank at Wenatchee, $275,000; and a bank at White Bird, $200,000. Of course

(Testimony of W. T. Triplett.)

many of the banks we were assisting were in small sums. Aside from the Central Bank most of these banks weathered the storm, though some did not. There was a bank at Nez Perce that we had quite a large sum loaned to, a bank at Kamiah and Orofino; a bank at Lind; one at Grangeville, and there might be one or two others, were closed. Notwithstanding our assistance, they had to close their doors. As to the question of assistance to the Central Bank & Trust Company, I don't think at the outset it was a question of rediscount, but of borrowing in one form or another. They had two forms of borrowing. They would send us their notes secured by collateral and rediscounts bearing their endorsement or guarantee; of these borrowings $20,000 was secured by Liberty Bonds. Later, they wanted to get an additional sum and they wanted to know if it would be satisfactory to us to dispose of the Liberty Bonds and give us notes for collateral. They sold them to Mr. Barghoorn, but the transaction left us with some slow paper behind the note instead of the Liberty Bonds we had to begin with. On the rediscounts, the system we had was to send the rediscounts to them ten days before they were due, write them a letter, and under the arrangement we had with them we were to charge their account on the due date whether they were paid or not. That custom was followed generally until they got into an overdraft. They had considerable overdrafts [79] in January and I didn't like it. The custom of recharging the

(Testimony of W. T. Triplett.)

discounts on the due date was generally followed until about January 1, 1921. In rediscounting notes, we required financial statements showing the solvency of the borrower and the assets from which he could liquidate the note at maturity. Sometimes the bank's supply of those notes would be more or less depleted; they did not have any more left and we would then take notes that we considered good, but slow. We didn't aid any banks unless they were asking for financial assistance, and the reason they were asking for it was that their resources had run down through shrinkage in deposits, or for some other cause, so that in all of this work we were doing, we were dealing with banks that were in a greater or less degree of trouble, present or anticipated. The assistance we rendered was extended to both members and nonmembers of the Federal Reserve System. Some of the banks which were members of the Federal Reserve System came to us and borrowed without going to the Federal Reserve because they had accounts with us and felt they could lean on us. I first heard of the draft drawn on us by the Central Bank & Trust Company in favor of the Seattle National Bank on the morning of 25th January through a letter from Mr. Buckholtz dated 24th January. The letter begins: "Looks pretty nice to get a slip showing a $39,000 balance for Saturday, but, now, wait until that big draft hits you to-morrow or Wednesday, which together with draft charged back will mean an overdraft of probably

(Testimony of W. T. Triplett.)

$15,000 again." That was the first information I had of any outstanding draft of that sort. When I read it, I went to Mr. Rutter to tell him that they had drawn on us for some large amount, evidently. Mr. Rutter picked the letter up and started to read it, and then he took a letter from his desk and handed to me, and I read it, and it mentioned the amount of the draft. That was the first I heard of it. The letter which Mr. Rutter handed me is the one stating that a $51,000 draft on us had been sent to the Seattle National Bank and in which it was said "If you pay it, the overdraft created will be the limit to date of credit advanced this institution." That was the first intimation I had that any draft of this sort was outstanding. After Mr. Rutter and I had read those two letters, we went to our Executive Committee meeting, and I went to the country banks department [80] and found out how much they had on our books so as to be able to tell the Executive Committee [81] what the status was, and when we saw that it was going to overdraw their account $27,000 if we paid that draft, we went into executive session and decided not to pay it. We notified Mr. Barghoorn of our decision and Mr. Rutter got in touch with Fred Ross. We had some difficulty in getting hold of Mr. Barghoorn, and I think it was some time about 3:00 o'clock in the afternoon before he was notified of our decision. I had no telephone communication on that subject whatever with Mr. Buckholtz. I would not have discussed the ques-

(Testimony of W. T. Triplett.)

tion of the draft and what the bank was going to do about it over the telephone; absolutely and unqualifiedly those letters were the first intimation I had of any such draft. The stamp which appears on the letter to Mr. Rutter is placed there by the mail clerk who receives the mail, opens it and distributes it. He places a time stamp on each letter as he opens it, and that stamp shows that the letter was received at 8:00 o'clock on the morning of 25th of January. I called Mr. Buckholtz up on the 25th. We first talked about some Liberty Bonds Mr. Barghoorn had back of his notes and I told him about those bonds having been disposed of. Then when we decided to charge certain mature notes to the bank's account, I called him up and asked him to get a pencil, I was going to make some charges against his account and make them right now. He didn't discuss it or ask me any questions about it, but directed me to wait a minute and got a pencil and came back and said "shoot," and I gave him a list of the notes and what they were for, and after we had talked about them for a few minutes I hung up the phone. I am not positive whether I at that time communicated to him the decision of the bank not to pay the draft. The draft came into the clearing long about noon on the 26th and was rejected pursuant to our previous decision. I didn't tell Mr. Buckholtz in any of our conversations on that day to be sure and get those charges in on the books of the bank that day. I didn't know what they were

(Testimony of W. T. Triplett.)

going to do; I merely told him what we were going to do. The remittance from the Central Bank bearing date January 21, 1921, containing the $45,000 draft, the $3,000 draft, and a number of smaller items aggregating $48,594.65, was received at our bank about 9:00 o'clock on the 22d January. I didn't see that remittance as we have a mail teller who handles such matters and this was just entered on our books to their credit in due course. [82] My attention was called to the remittance in this way: The lady who keeps the country bank ledger places on my desk each morning a list of the country banks' overdrafts. The 22d was on Saturday, and on Monday, the next business day, when the overdraft list was placed there, I noticed that the name of the Central Bank which had been there most of the time, with a few exceptions, was missing, and I thought she had made a mistake, so on my way to the executive meeting I stopped and asked her if she had not forgotten that name, and she said that it had made a big deposit. I asked her to show me and she turned to the ledger sheet which showed a quite sizeable balance, $38,000 or some such amount, and I afterwards looked it up and found the deposit slip. The aggregate of the deposits which the Central Bank made with us are shown in the statement that was introduced in evidence and that corresponds with our books, allowing for the difference in time. There was nothing to direct my attention to that particular deposit slip except it was a good sized amount, and

(Testimony of W. T. Triplett.)

I was glad to see it. There was no letter accompanying it, just the slip, and I had no information on the subject except what the deposit slip gave me, and I received no other information before the 25th as to it. That deposit was received and carried to their credit about 11:00 o'clock on the morning of the 22d of January; on the 21st there was an outstanding draft against us came in for $9100; on the 22d, one for $500 and one for $58.50; on the 24th, one for $5.76; one for $303.75, one for $1438.62, and one for $17,789.38. These drafts were paid in due course by the bank and they were what depleted the balance so that the cash balance at the end of business on the 24th in favor of the Central Bank & Trust Company was a little more than $24,000; no drafts drawn against us by the Central Bank came in on the 25th. We paid some drafts on the 26th after that came in. Between then and the morning of the 26th we received a remittance from them of $921.21 and one for $143.09. There were other credits on the account put on that day, notes that they had sent us for rediscount. I think the balance was less than $2,000 at the close of business on the 25th after we had charged off other matters. On the 25th, we charged up [83] rediscounts. After we decided not to pay the draft, we decided that we would charge up past due notes to the amount of $25,672.64. We only charged up past due notes, notes that were supposed to have been paid on their due dates. When that was done it would leave the

(Testimony of W. T. Triplett.)

account less than $2,000. I would have to get the figures to be exact on that. No confidential matters were discussed between Mr. Buchholtz and me over the long distance telephone; we would not discuss any matters over the telephone that might get to the public and be detrimental to the bank. Matters of importance that we would not object to anyone hearing would be discussed over the telephone, but nothing concerning the welfare of the bank; such matters were committed to written correspondence. The Central Bank had had an overdraft with us for some little time, in fact during the year 1920, and running along into January, 1921. In the early part of January we told Mr. Barghoorn that we were not going to pay any more overdrafts. In fact, the Executive Committee went on record against paying overdrafts for any country bank, but we didn't adhere to that rule rigidly because a check might come in and if we turned it down it would embarrass the bank, so we were more or less lenient. However, he was informed along in January that he must cover the overdraft and keep it covered, and after he hired Mr. Buchholtz and took him to Yakima they sent us enough rediscounts to cover the overdraft. That meant that we were carrying a much larger sum for the bank than we had been in spite of continued rediscounts and the substitution of collateral that would enable him to sell his Liberty Bonds, the account kept being overdrawn, and it ran into quite a considerable figure. It got to a place where we

(Testimony of W. T. Triplett.)

thought it was out of all reason. The paper that was coming in to us was not of the highest type; it looked like it might be a little slow to realize on, and when we had as high as $200,000 loaned to the bank, we felt it would be foolish to burden ourselves with paper that might ultimately be a loss. The paper simply wasn't satisfactory, and we decided that if we paid the overdraft of $27,000, all we could get for it would be a [84] bunch of paper that wasn't satisfactory, as the paper that had been sent us before was not satisfactory, and so we decided we would not pay it. That was the sole reason for our refusal. Prior to the time Mr. Buchholtz went to the bank in the month of January, our source of information as to the condition of the bank and its prospects and outlook was either Mr. Barghoorn or Mr. Ellis. After Mr. Buchholtz was hired, he did all the corresponding. He kept us informed by letter and telephone. Outside of what he may have said on the telephone, the letters in evidence gave us the total information as to the condition of the bank. Nothing that would reflect upon the condition of the bank was talked over the telephone. I don't think anything serious was talked in that way because we would not have discussed it over the telephone. Up to the time that I read the letter to Mr. Rutter dated 23d January, I had no idea that the bank was insolvent or would go on the rocks. We had letters from Mr. Buchholtz from time to time; some days he would feel discouraged,

(Testimony of W. T. Triplett.)

and the next day he would say things were coming along fine; that is all we knew about the condition of the bank. I don't recall having any talk with Mr. Barghoorn after Mr. Buchholtz went down there except to show him some letters I had from Mr. Buchholtz.

On cross-examination the witness testified as follows: The rendering of financial assistance to other banks was done in the regular course of our banking business. When we loaned money we charged interest for it, and when we rediscounted paper we would not take any that we did not think was good. We expected that by extending assistance to these banks, a willingness would be created to bring other business to us. We were willing to assist the Central Bank, but did not wish to lose money in doing so. I am fond of Mr. Buchholtz personally and consider him a very valuable man. I wouldn't like to lose him, but we have men higher in our organization that we have let go to smaller banks if we felt it was for their interest, and we thought it was a good opportunity for Mr. Buchholtz to go to Yakima and work up business for himself. He is a married man, and his wife did not leave Spokane. His home is in Spokane and he is still [85] living there. When he came down here I thought we had lost him for good. When I said in the letter of 5th January to Mr. Ellis that "We have, after talking to Mr. Barghoorn, credited you with $12,681.05 to cover the proceeds of the rediscounts

(Testimony of W. T. Triplett.)

sent by you. Two of the notes were not altogether satisfactory, namely those of J. L. Parker and the Western Fruit and Produce Company; but as Mr. Buchholtz, who is one of our right hand men is accompanying Mr. Barghoorn to-night, he will endeavor to obtain substitution of other paper." I understood that Mr. Buchholtz was going to endeavor to obtain the substitution of other paper for the Central Bank to enable it to secure money. We turned those notes down, but took them temporarily in order to tide them over. It was our paper subject to their getting something else that would be satisfactory. When I said that Mr. Buchholtz is our right hand man, he had been with us a great many years and we had not yet got to the place where we realized that he was gone. After the Central Bank closed its doors, he was back on our pay-roll immediately. I know that the liquidator in charge of the Central Bank has refused to allow Mr. Buchholtz' claim for salary because he said that it was not established to his satisfaction that Mr. Buchholtz was on their pay-roll. I didn't like the way Mr. Ellis handled our rediscounts. If we were going to render such assistance to the Central Bank as it requested of us and needed, we felt it ought to have a man there who would be able to pick out the kind of paper that would be satisfactory to us. If the Central Bank wanted to get the assistance, it was up to them to put somebody in there that would do it our way. They could not get assistance unless

(Testimony of W. T. Triplett.)

they furnished us the kind of paper we wanted, and I had sufficient confidence in Mr. Buchholtz to believe that he understood our requirements and would be able to do it. We didn't want Mr. Ellis to get hold of our rediscounts at all. Mr. Ellis was cashier of the bank, but we knew Mr. Buchholtz' confidential relations with Mr. Barghoorn and that Buchholtz would ultimately succeed Ellis as cashier of the bank. During Mr. Buchholtz' stay in Yakima he did not write to Mr. Barghoorn, but he wrote letters to me that I showed Mr. Barghoorn. Thereupon the following questions were put to the witness by counsel for the plaintiff, and the following answers given: [86] Q. You knew of Mr. Buchholtz' confidential relations with Mr. Barghoorn, and yet during all of Mr. Buchholtz' stay here he never wrote a letter to Mr. Barghoorn?

A. No, but he did write letters to me that I showed Mr. Barghoorn.

Q. Sure, that is the way it was done; that is the way Mr. Buchholtz communicated everything he had to say to Mr. Barghoorn, whom you claim was his employer,—did it by writing to you direct, and you showed it to Mr. Barghoorn if you chose. That is true, isn't it? A. If I chose, yes.

There was a run on the Central Bank during the first of January. After it had been going on for three or four days, we heard they were having some heavy calls. On the 5th of January Mr. Buchholtz went down with Mr. Barghoorn. When

(Testimony of W. T. Triplett.)

Mr. Buchholtz went to Yakima, the Central Bank owed us $142,000. Some time afterward, in January, it went up to $212,000; that was made up largely of rediscounts which Buchholtz sent us. When the account was closed, I think the amount of the Central Bank's indebtedness to us was $182,000, but it might have been $162,000; I can get the figures later. After January 1st, we charged some rediscounts back promptly and some we didn't. The main reason we didn't charge them all back was because we didn't want a big overdraft on the books. We own a rediscount until it is either taken up by the bank or paid. We changed our policy in January of not charging back rediscounts after they were dishonored because we didn't want any overdraft increases. The Central Bank owed us $142,000, part of which was secured by Liberty Bonds and might be eliminated from the calculation, but later on they had run the amount up to $212,000 and we had to render assistance on [87] paper that we considered slower. We had increased the load we were carrying for them and did not want to carry an overdraft in addition. If we had charged the rediscounts up to them and returned the paper, we would have had merely a bank overdraft, while if we held the paper we would have something to show for it. We would rather have a past due note than an overdraft. We held some fruit drafts that we didn't charge up for a long time. They are a different thing from rediscounts because they

(Testimony of W. T. Triplett.)

are dependent on the arrival of cars, transportation facilities, etc. When I said to Mr. Buckholtz in a letter that I was enclosing a list of outstanding fruit drafts some of which were a hundred years old, more or less, that was just a figure of speech. They had been out for some time. As soon as the fruit began to move, the Central Bank made arrangements with us whereby they were to send us drafts drawn payable on arrival of cars with bills of lading attached. They would send them to us like any other cash item and we would give them credit for them, and when they were paid we would charge interest for the time they were outstanding. If any of the drafts were dishonored, or the apples froze in transit, or any other condition of that kind, we charged the drafts back to the Central Bank. We usually try to give them all the time they need to get the drafts paid so as not to be charging something back that would reduce their account and disturb their reserve. It was the same arrangement we had with some other banks. I first learned of the outstanding draft of $51,000 on 25th January. This was through a letter written by Mr. Buckholtz on the 23d to Mr. Rutter. At that time the Central Bank had a credit balance with us of about $24,000, and we charged back to them enough rediscount paper to cover that balance. I called up Mr. Buckholtz and told him that we were going to make these charge-backs on our books. I did this because I knew it would disturb their reserve and it would be up to

(Testimony of W. T. Triplett.)

them to raise funds somewhere. If I had waited to advise him by mail, he would not have known of the charge-backs for another day, and we wanted him to know right away. Mr. Buckholtz said in his letter that if the draft was not honored the bank would be busted, but I didn't know whether that meant anything because there are plenty of ways for raising money at the eleventh hour. If we had paid that $51,000 draft, the Central Bank account with us would have been overdrawn some $27,000. They had had as large an overdraft [88] as that before, but we didn't want to go on and create another overdraft. They had an overdraft with us almost continuously during the month of January and until they sent us some thirty thousand odd dollars worth of paper that practically wiped that out and eliminated the overdraft. My attention was directed on the 24th to the large remittance received on the 22d. I found out they had sent us a remittance of forty-odd thousand dollars in which were two large items, one not exceptionally large and the other of considerable size, $45,000.

Testimony of R. L. Rutter, for Defendants.

R. L. RUTTER on direct examination testified as follows: I am president of the Spokane & Eastern Trust Company; have been with that company for about twenty-seven years. The general policy of the company toward getting employees for other banks and extending financial assistance

(Testimony of R. L. Rutter.)

to other banks is as testified to by Mr. Triplett. I believe Mr. Barghoorn bought the control of the Central Bank in the first half of 1919. Shortly afterwards he arranged with me for our bank to act as his correspondent. It was just the ordinary arrangement with the country bank; we acted as their correspondent, taking rediscounts, etc., as the business demanded. In the latter part of 1920, Mr. Barghoorn told me it was necessary for him to get someone to succeed Mr. Ellis. He negotiated with Mr. Richards, a gentleman connected with the Spokane & Eastern. Mr. Richards went to Yakima for a day or two and decided not to take the offer. Mr. Barghoorn continued to inquire about getting someone, and finally he decided to employ Mr. Buckholtz. I had known Mr. Buckholtz well since 1914. I keep in close touch with my employees, have an actual personal acquaintance with all of them and am on friendly terms with them. I had a great deal of confidence in Mr. Buckholtz and have yet. The only conversation I had with him about the matter was when he came to me and asked if we were trying to get rid of him. I assured him we were not, but thought it a good opportunity for him and a good thing for Mr. Barghoorn. He was concerned about the reason for our recommending him for the place. We knew about his being employed and approved of it. There was no understanding, express or reserved, on my part, or the part of the bank, or anybody connected with it, that Mr. Buckholtz should go to

(Testimony of R. L. Rutter.)

Yakima as the agent of the bank. He severed his connection not only in form, but in fact, with our bank. Upon my conscience and without reserve of any kind or [89] character whatever; that is the whole truth. I first heard of this $51,000 draft by a letter from Mr. Buckholtz dated 23d January and received 25th January. That is the first I had heard of it in any shape, manner or form. I do not think it was possible that any other employee or officer of the bank could have been informed of it before. If anyone from Yakima had called up to tell our bank of such a draft, I would have been informed. Mr. Triplett brought his letter down dated a day later but received the same morning, and we went into the Executive Committee and there determined not to pay the draft, after calling in and consulting with our attorney Will Graves, who is a member of our board of directors. During the time Mr. Buckholtz was in Yakima, we had no idea that he would act as the agent of the bank. After our employees leave us and go to other banks, they frequently write us telling us their troubles and asking advice, and come to us for help, which they generally get. With respect to the severance of Mr. Barghoorn's connection as a director with our bank, a few days before the annual meeting he came into my office and said that he didn't care to be elected at the next meeting. He gave no reason, and I told him it would be all right; that was all there was to it. With respect to the letter from Mr. Buchholtz re-

(Testimony of R. L. Rutter.)

questing me to extend my good offices to keep the bank examiners away from him if possible, I did nothing about that in any way; never mentioned it to anyone nor directed anybody else to. I am sure I could not have done it if I had tried to, but I had no notion of doing it anyhow. I remember the meeting of the Guaranty Board testified to by Mr. Hay. The Governor said something about a draft having been turned down, and I told him that I didn't think it was possible; then something was said about somebody being over there, and I said Mr. Buchholtz was there working for Mr. Barghoorn. I told him who Buchholtz was and that I knew he was a good man, and so on. Whatever form of expression I may have used, I did not intend to convey the idea that he was over there representing us, for I had no idea of that kind in my own mind. I don't remember that date, but if it was the 22d, as testified to by the examiner, no draft had been turned down then and I had not heard of any [90] draft that was likely to be turned down, and didn't suppose any would be. [91]

On cross-examination the witness testified as follows: This matter between the Governor and the Bank Examiner interested me in no other way than in the general welfare of the financial interests of the state. My recollection is that it was said that a draft had been presented and not paid. I didn't ask the Governor not to press it. As I remember it, I told him that Mr. Buckholtz, a good

(Testimony of James A. Loudon.)

man, was over there in the employ of Mr. Barghoorn.

Testimony of James A. Loudon, for Defendants.

JAMES A. LOUDON, on direct examination testified as follows: I am connected with the First National Bank of Yakima. Commencing with the 1st of December, 1920, and going on during the month of January, 1921, in a period of six weeks, there was a decrease of about 13% in our deposits. It was a gradual decrease caused by the cessation of fruit shipments.

On cross-examination the witness testified as follows: There was no run on our bank, that happens every year. I heard there was a run on the Central Bank in the early part of last January.

Testimony of H. C. Lucas, for Defendants.

H. C. LUCAS on direct examination testified as follows: I am president of the Yakima Trust Company. There was a decrease in the deposits in our bank of about 16% during the latter part of December and January, 1921. It was caused in the same general way that Mr. Loudon spoke of.

Testimony for Charles Heath, for Defendants.

CHARLES HEATH on direct examination testified as follows: I am connected with the Yakima Valley Bank. During the latter part of December, 1920, and January, 1921, there was a decrease of deposits in our bank of about 13%.

Testimony of W. F. Buckholtz, for Defendants.

W. F. BUCKHOLTZ testified on direct examination as follows: I am the Buckholtz that has already testified for the plaintiff; I am 28 years of age; was born in Minnesota of German parentage. I first entered the employ of the Spokane & Eastern Trust Company in the early part of 1914 as bookkeeper. I continued in that capacity for a year or two; then went out to a country bank for about two months while the cashier was away. I was just employed to take his place and recommended by the Spokane & Eastern Trust Company. [92] When I came back I returned to the employment of the Spokane & Eastern, but during that summer there were several times that I went out to other banks temporarily to relieve people that were on vacations or sick. I went on the recommendation of the Spokane & Eastern, but the bank to which I went paid my salary. In February of 1916, on the recommendation of the Spokane & Eastern, I got the position as cashier of the First State Bank of St. Joe, Idaho. I was with that bank a little over two years, and then went back into the credit department of the Spokane & Eastern, remaining with it continuously for two years, about. Then I severed my connection with the Spokane & Eastern and went to Myrtle Point, Oregon, and acted as cashier of a bank there for about four months. I went there on the recommendation of the Spokane & Eastern, and after I quit I took a little trip and

(Testimony of W. F. Buckholtz.)

finally dropped into Spokane and went back to work. I have had no other employment by any other bank since that time until I came to Yakima. Somebody told me that Mr. Barghoorn wanted to see me, and I went to his office and had quite a lengthy conversation with him. He told me that he knew that I had had considerable credit experience and that Mr. Rutter had recommended me very highly as a man who was capable of handling credit in his bank at Yakima. I didn't give him an answer at that time. I was surprised at his proposition and felt as though Mr. Rutter wanted to get me out, and it kind of hurt my feelings, and I went to Mr. Rutter and had a talk with him. He assured me that it was not a question of getting rid of me, but that it was a mighty good thing for me; and after talking it over with him I told Mr. Barghoorn I would go. Mr. Barghoorn told me that he eventually intended that I should supersede Mr. Ellis and be cashier of the bank. I left that night with Mr. Barghoorn to go to Yakima and had another long talk on the train. He explained to me in detail what my duties were to be, to work together, to work into the credit; what I was to do; what Mr. Ellis was to do, and how to get along. Thereupon the witness testified as follows: "I asked him who I was to look to as my boss, if there was going to be a boss and who it would be, and he said there would be no one between he and I; I said, 'Well, you have a cashier there,' and he said, 'That part of it [93] is all right, eventually I intend

(Testimony of W. F. Buckholtz.)

for you to be cashier.' " At that time I totally and completely severed my relations with the Spokane & Eastern. There was no express, implied or inferred agreement on my part, or any suggestion of any sort made to me by anybody that I was to be in Yakima as a representative of the Spokane & Eastern, and I did not understand, suppose or infer [94] that I was to be. I remember the correspondence with Mr. Triplett in which I said, in substance, that I saw no objection to taking rediscount paper as it came due and holding it as agent of the Spokane & Eastern. It first came up in this manner: A borrower would come in to deal about his note, to make changes, renew or reduce it, or take security, and the note would not be in the bank; it was in Spokane. It made it inconvenient, and I wanted Mr. Triplett to send the notes that were past due, or nearly due, down here, and told him I would look after them for him; that is, look after collections and renewals, and would return the renewals, and so on. I was going to do that in my individual capacity and was not going to be paid anything for doing it by the Spokane & Eastern. It was just for the accommodation of the Spokane & Eastern and also for our benefit. I wanted to reduce the rediscounts as rapidly as possible. In my conversation with Mr. Barghoorn on the train he talked to me about the handling of the rediscounts. He explained to me that the Spokane & Eastern had complained about the shape the rediscount notes would get in; that they would not

(Testimony of W. F. Buckholtz.)

have sufficient information on them for the bank to ascertain whether they were good liquid paper, or sound or not, and the result was that it entailed a great deal of correspondence before they would get anywhere. He said Mr. Rutter had told him that I knew pretty well what their requirements were and what was necessary for them to pass on a note, and that he felt it would save a lot of confusion and delay. When I got to Yakima, I took charge of the collections and the paper, what is generally called the Credit Department. I did the bulk of that work, although I would consult Mr. Ellis very often and occasionally he would handle a matter by himself. A great many times, however, I would handle it without consulting him. I tried to run it in the same way that I would run the affairs of any other bank. In some of these letters, I speak of not having nerve enough to send them certain kinds of paper, etc. That did not refer to the soundness of the paper, but to its liquidity. In January, the Spokane & Eastern was not financing crops for that year that on the face of them the notes would not be paid until the fall of 1921. They held me to paper that had the actual commodity behind it and which would be liquidated in a short period. They commenced to make payments on the crop in 1921, usually in April, May and June, so what I said about those notes not being good, and so on, unless otherwise [95] explained, refers to their liquidity. My letters and telephone calls between Yakima and Spokane were with Mr.

(Testimony of W. F. Buckholtz.)

Rutter and Mr. Triplett, except a time or two that I called up Mr. Hubbard. I communicated with Mr. Rutter because he was the president of the bank and with Mr. Triplett because he had the management of the country bank business for the Spokane & Eastern. The calls to Hubbard did not relate in any way to the business of the Central Bank. He had a good-sized post-dated check on the First National Bank of Yakima for collection, and he wanted it promptly presented for payment the day it matured, and he sent it to me and asked me as a personal favor to attend to it for him. With respect to my wife remaining in Spokane while I was in Yakima, I have my own home in Spokane and my wife and family have lived there for quite a while. We don't change about very much. When I went to Myrtle Point, which is a long ways off, and was there for two or three months, I left her in Spokane at that time. That did not imply that I expected my employment would be temporary. I expected it to be permanent, and if it had been I was going to bring her to Yakima. I remember the occasion I went to see Mr. Louden at his bank and gave him a card. The occasion of my going into his bank was that I wanted to get his ideas as to crop movement and conditions and the general tendency in Yakima at that time, and I dropped in there one noon and introduced myself and told him I was over at the Central Bank, and he said that he understood someone was there from the Spokane & Eastern and asked if I was, and I said

(Testimony of W. F. Buckholtz.)

yes. Before I left I gave him one of my cards. It happened to be the only cards I had; it was the same kind of a card that I gave Miner of Seattle. I had had those cards printed a couple of years before that, while I was working for the Spokane & Eastern. I had quite a large supply. They were the only business cards I had and it was for that reason that I used them. As to the conversation with Mr. Miner, I came out of the hotel with him and some other men, and I asked him if he was from the Seattle National Bank, and he said yes, and we introduced ourselves, and he asked how I spelled my name. I told him it was a hard name to remember and I gave him one of these cards. He asked how long I had been with the Spokane & Eastern, and I said probably five or six years. We had no [96] other conversation of any length except a few words down in the Central Bank. Minor and Nossaman were there gathering information, and one of them asked if I knew how this happened, and I said yes, and offered to assist them in gathering the facts. I was there and doing nothing. I cannot recall what the conversation was, but we did talk about it as we stood around there. I don't recall that I said the bank would not pay more than 30%, but it is quite possible that I did; that was a wild estimate. I was down there during those conferences and heard the list of losses that the Yakima banks had piled up, and it was apparent to me, after seeing what they aggregated, and there were various estimates, some joking and

(Testimony of W. F. Buckholtz.)

some serious, mentioned after all hopes had been given up, and I believe they estimated losses at about $100,000, and I took into consideration their deposits and the amount of paper in the pouch, and lumped it off at about 30%. I was confident those local bankers knew what they were talking about. I don't remember saying what the percentage would be, but that is about the way I thought about it after hearing the Yakima bankers at the conference. I did not tell Miner that I had telephoned the Spokane & Eastern of the drawing of this draft. I didn't telephone the Spokane & Eastern about it. I never talked about that draft to anybody at any time. I did not communicate the fact of that draft having been drawn to the Spokane & Eastern by any other means than the two letters, one on the 23d and the other the 24th of January. I didn't communicate to any of the officers of the Spokane & Eastern Trust Company anything about the condition of the bank, except current business, save as it appears in the letters that have been put in evidence, and so far as I know those are all the letters that I wrote them. The cash letter which the Seattle National Bank sent with its collections was never seen by me. The first I knew about it was late in the afternoon, when I think the bank was closed. I was in the habit of occasionally dropping around to the draft register and I saw a draft registered on the book drawn on the Spokane & Eastern, and I immediately asked Mr. Lemon what it was, and that was my first knowledge of it. He went on to

(Testimony of W. F. Buckholtz.)

explain what it was. I had not talked those collection items over with Mr. Ellis when [97] they came in. My first knowledge of their receipt was when I saw the draft registered on the register. I think Mr. Lemon called my attention to the two large checks in the remittance letter draft. He called my attention to how it occurred. He said there was a large collection letter which came from the Seattle National Bank, and the items had been put in the clearings and settlement made and a good-sized remittance was coming to Spokane as a result of what they won in the clearings. Just what items were going to Spokane I didn't know until about a month ago, since this lawsuit has been started. I didn't know what items went to Spokane, what kind of drafts, or what the items were until after the lawsuit was started. I didn't know the method of clearance in detail while I was employed at the Central Bank. I knew it was done through the Yakima Valley Bank, but I didn't go into it because I had nothing to do with that department. I first knew Mr. Triplett when I was a schoolboy in Spokane, and he and I have been friends for a good many years. During the time of my employment in the Spokane & Eastern, I had a great deal to do with him outside of our business relations. We were on very friendly and familiar terms and I was very fond of him.

On cross-examination the witness testified as follows: During the last two or three years I have

(Testimony of W. F. Buckholtz.)

only been at home about a fourth of my time. The occasion for my being away so much was working in other banks, and sometimes an occasional trip. The last bank I was employed in was at Myrtle Point in the spring of 1919. The witness then went on to enumerate a number of banks in which he had worked temporarily to relieve persons from president to bookkeeper absent on vacation for periods ranging from two weeks to two months. "When I got through I went home." Resuming, he testified: In my conversation with Mr. Loudon he asked me if I was making an audit or going through the assets, and I said I was working on that; I had been doing something along those lines. I believe I told him I had done such work before, but I don't know that I said I had just finished such a job. I have occasionally in calling on a bank, or sent out to a bank in places [98] where they were friendly, gone over the assets and made reports as to classifying assets in different classes. My first conversation with Mr. Barghoorn about going to Yakima was shortly after New Years. I think it was on the day that I went to Yakima. I don't remember exactly the time of day when I had the conversation with Mr. Barghoorn and Mr. Triplett. I think my last conversation with Mr. Triplett was late in the afternoon because he was signing his letters, and he usually does that about 5:00 o'clock. I went home early and told my wife I was going to Yakima. I left with Mr. Barghoorn on the 6:30 train that night. When I went to Yakima

(Testimony of W. F. Buckholtz.)

I had no understanding with the Board of Directors of the Central Bank. The first money I drew from the Central Bank, if I remember correctly, was the 15th of January. I think it was $80. That wasn't expense money. The employees were paid twice a month and Mr. Ellis had made out the pay checks. He asked me if I wanted any money, and I said that perhaps I had better draw some, and he asked me how much, and I didn't want to draw more than I had earned, and I just estimated in a hurry that there would be $80 coming at least, and asked him for that. I drew another $100 later in the month, the 25th or 26th. From time to time there were substitutions of notes which had been rediscounted for the Spokane & Eastern. I attended to the substitution. I would select from the bills receivable of the Central Bank the notes that were to be sent to the Spokane & Eastern for rediscount. Frequently notes rediscounted by the Central Bank had to be renewed. I handled all those notes. When a man came in, I talked to him, and if there was a renewal made, I made it. The Spokane & Eastern sent those past due notes and rediscounts direct to me after I had been there for a while. The correspondence will show when that commenced. I reached Yakima on the morning of the 6th. I did not pay any attention to items that came into the Central Bank by mail unless it happened to be something in payment of a note. In that case it would probably be turned over to me. I wasn't working on the lines of the remittances received

(Testimony of W. F. Buckholtz.)

by the bank, but I made a practice of looking to see what our statement was every night. I knew substantially the amount of [99] remittances that the Central Bank made to Spokane on 21st January. I didn't see the remittance letter to Spokane. The remittance of $48,000 didn't escape my attention. I saw on the draft register that this had occurred and I asked Mr. Lemon the nature of it. I saw this draft of $51,000 on Spokane before it went out. It was a good-sized one and I knew the Central Bank didn't have any money in Spokane to meet it unless they were sending money there for that purpose. I asked Mr. Lemon if we had lost any in Spokane that day and he said no and I understood from that that there was enough going to cover it. I understood that our balance didn't depreciate any, that there was something else went to our credit, because we didn't lose there. I took it for granted that there was a remittance going to Spokane of approximately that size. Thereupon the following questions were put to the witness by counsel for the plaintiff, and the following answers given:

Q. Did you make any inquiry of Mr. Lemon as to what it was, how it happened he had enough to send to Spokane to meet a draft of that size?

A. Well, I took it for granted that there was a remittance of approximately that size going.

Q. Didn't it excite your curiosity at all as to where it came from, that amount of money?

A. Yes, I have already explained I asked him the nature of it and he told me.

Testimony of W. T. Triplett, for Defendants.

W. T. TRIPLETT testified on direct examination as follows: Concerning the figures I was asked about a while ago, I have taken them from the statement of the Central Bank. At the close of business on 24th January, the Central Bank had a balance of $24,682.58 on our books. Some time during the 25th, we received cash letters and also rediscounts from the Central Bank which were credited to their account, giving them a balance of $31,704.03 on our books. However, those [100] entries did not all go on the books at any one time. Other items may have been on before that happened, and I don't think you will ever find a balance of $31,000 on the books at one time. After we had charged up the rediscounts that were past due and had made some other charges of exchange and interest, and two or three fruit drafts, the Central Bank had a balance of $170.92. I don't think there were any drafts paid on the 25th January, but there were on the 26th. The Central Bank owed us at the close of business on the 25th one hundred sixty-two thousand odd dollars. That included bills payable and rediscounts, and that was $20,000 more than they owed when Mr. Buchholtz went to Yakima. The Central Bank owed us between $185,000 and $190,000 before we charged those items back on the 25th. The amount the Central Bank owed us when Mr. Buchholtz went away was about $142,000, part of which was secured by Liberty Bonds. The Liberty Bonds had been sold and in place of them we got

(Testimony of W. T. Triplett.)

slow notes, many of which are not yet paid. The character of the [101] notes we held when the Central Bank closed was very much worse than the notes we held when Mr. Buchholtz came over. That occurred in this way: We were in the habit of charging their account with the notes when they came due. It was up to them to make their account good after that was done. It was up to them to furnish us with notes that were satisfactory to us. As time went on, the notes became of a slower nature. They collected some of the better ones and we had up quite a little more money and had to take a slower class of paper for it. The notes became worse in the process of increasing the amount. The notes and other items that were charged back to the Central Bank on the 25th of January were turned over to the Central Bank and have never been in our possession since. They were sent to the Central Bank and so far as we know them must have gone into the hands of the receiver.

On cross-examination, the witness testified as follows: $142,000 of the $162,000 that the Central Bank owed the Spokane & Eastern was represented by rediscount notes; the balance of it by bills payable secured by notes. The bills payable was a note of the Central Bank & Trust Company in our favor. I am not sure whether Mr Barghoorn was an endorser on it or not. The condition of our account when the Central Bank closed was worse than when Mr. Buckholtz went to Yakima. We had $20,000

(Testimony of W. T. Triplett.)

worth of Liberty Bonds when he went over and we permitted the Central Bank to sell them and give us a bunch of slow notes. The scheme of improving the Ellis arrangement didn't have time to pan out. At the close of business on 25th of January, the Central Bank's balance with us was $170. We charged the notes to the bank on that day; they were past due and we had a right to.

On redirect examination the witness testified as follows: I heard Mr. Miner testify that Mr Barghoorn told him that before the blow-up the Spokane & Eastern had gotten $75,000 worth of collateral out of him. I cannot tell you when the Spokane & Eastern got collateral from him, but the Central Bank was borrowing from us, Mr. Barghoorn had some personal loans in our bank, and his bank in Colville also had some loans. In view of the amount that we were carrying in his interest we thought it only right that he should personally get behind such paper as we were carrying for him. We talked about the matter several times and finally it came to a head one night when [102] Mr. Barghoorn was going away. A paper was drawn up by which he endorsed all the paper we had of the Central Bank, Franc Investment Company, Sikko Barghoorn and the Colville Loan & Trust Company. We got an assignment of his profit in a dredging contract in Idaho. We didn't get anything out of it; the machine finally burned up. That occurred before Buchholtz came to Yakima.

It was stated that Mr. Barghoorn had been a director of the Spokane & Eastern Trust Company since 1908. [103]

There was introduced in evidence a sheet showing the debits against the general account of the Spokane & Eastern Trust Company with the Central Bank & Trust Company from the 3d to the 26th January, both inclusive, such debits being on account of rediscounted notes and cash items remitted by the Central Bank & Trust Company to the Spokane & Eastern Trust Company on the days hereafter shown. The amounts of the notes remitted for discount and the dates thereof were as follows:

January 3, 1921	$12,304.60
4, 1921	6,000.00
8, 1921	47,127.58
Sold note (Franc Inv. note)	11,000.00
January 11, 1921	21,250.00
Jan. 12, 1921	7,839.91
January 17, 1921	5,250.00
January 18, 1921	2,900.00
January 19, 1921	4,600.00
January 20, 1921	6,100.00
January 21, 1921	5,775.00
January 22, 1921	500.00
January 24, 1921	6,400.00
January 26, 1921	4,900.00

[104]

The cash letters or cash remittances during the same period showing the amounts and the dates thereof were as follows:

Date.	Amount.
Jan. 3, 1921	$6,663.37
4	3,443.33
5	4,416.35
6	4,429.12
7	4,746.13
8	792.05
10	17,908.41
11	6,138.55
12	637.14
13	6,336.78
14	1,347.14
15	6,918.45
17	6,815.20
18	16,818.37
19	2,974.50
20	3,731.73
21	48,594.60
22	2,449.28
24	3,985.73
25	6,907.41
26	794.96

[105]

There was also introduced in evidence a sheet showing drafts drawn by the Central Bank on the Spokane & Eastern Trust Company in favor of the Seattle National Bank covering remittance letters and paid by the Spokane & Eastern from January 14th to 27th of 1921; and showing also that these drafts were similar to many others in the files of the Central Bank covering several months. The particular items shown were draft No. 2242, dated 13th

January, 1921, for $1498.40, paid 17th January; No. 2239, dated 12th January, for $3294.71, paid 17th January; No 2241, dated 13th January, for $6319.36, paid 17th January; No. 2245, dated 14th January, for $12,784.77, paid 19th January; No. 2249, dated 17th January, for $2636, paid 20th January; No. 2250, dated 17th January, for $566.79, paid 20th January; No. 2252, dated 18th January, for $17,-798.38, paid 24th January; No 2257, dated 20th January, for $1438.62 paid 24th January; No. 2262, dated 22d January, for $541.22, paid 26th January.

Sheets were introduced in evidence showing cash letters sent by the Central Bank to the Spokane & Eastern Trust Company containing transfer drafts drawn by the Yakima Valley Bank during the months of October, November, December and January. Those showing drafts for considerable amounts upon the Fidelity National Bank of Spokane and the Bank of California of Tacoma were as follows: [106]

On October 11th, the cash letter contained a draft on the Fidelity National Bank for $13,000, the total cash letter being $13,286.25; On October 16th, there appeared a draft on the Bank of California of Tacoma for $31,000, total remittance being $33,301.68. On November 15th there appeared a draft on the Fidelity National Bank of Spokane for $20,000, total remittance being $22,298.23; on November 22d there appeared a draft on the Fidelity National Bank of $10,000, total remittance being $18,302.41; on December 13th, draft on the Bank of California of Tacoma for $5,000 the total remittance being

$8,047.89; on December 20th, draft on the Fidelity National for $8,000, total remittance being $8510.50; on January 10th there appeared draft on the Fidelity National for $4,000, the total remittance being $6041.46; on January 18th there appeared a draft on the Fidelity National for $11,000, the total remittance being $16,812.37. [107]

It also showed that the total amount of such cash letters during the month of October, 1920, was $421,447.31; for the month of November, 1920, $317,722.18; for the month of December, 1920, $156,440.67 and for the month of January, 1921, $151,548.60. [108]

The following letters are those which were introduced in one bunch as Exhibit "7" by plaintiffs. The letters signed by W. F. Buckholtz are all written upon letter-heads of the Central Bank and Trust Company.

Plaintiff's Exhibit No. 7.

Jan. 6, 1921.

W. T. Triplett, Secy.
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

(Separate Proposition.)

I am enclosing Franc Inv. note $11,000.00 endorsed S. B. secured by miscellaneous collateral enclosed, endorsed without recourse.

Don't swear but I want you to take this over and credit account of this bank if you can get it thru. The collateral is all of a slow nature but

there are a couple of mortgages there which are no doubt covering good values and will add something.

I figure that you are not banking on the C. B. & Tr. Co. endorsement anyway; you have got an overdraft and will have. You have S. B.'s guaranty and are getting his assignment on dredging profits and in general it is his personal credit to a large extent that you are considering.

As it stands, you have an unsecured overdraft, by taking this over without recourse. I'd say it is not making it any worse and needless to say will help the situation here immensely. I take it the dredging operation has been thoroly explained and if that pans out as expected, S. B. will lift all his personal stuff there and on the way down here he said he expected some substantial returns on that during February. He of course has some scattered debts to meet, but all of it won't need to be paid immediately.

I am doing this on my own initiative—not at the request or suggestion of S. B. or anyone else, and I hope you will plug your darndest on this.

Yours truly,

(Signed) W. F. BUCKHOLTZ.

1–7–21.

W. T. Triplett, Secy.

Enclosed are the following notes:

J. H. Ames.....$170.00
J. D. Bridges..... 200.00
E. F. Burnell..... 225.00
J. F. Dukes..... 167.00 Don't swear.

Earl Hughes	217.00	
H. Moller.....	70.00	
Chas. E. Perry.....	225.00	
Curtis E. Pierson.....	100.00	
Lambert Parrish 60.00		
N. B. Strew	120.00	
John Wagner	56.40	
F. H. Fischer.....		
End. Fred S. Ross.....3318.00		
S. Coburn 3000.00		
Total	7928.40	All endorsed by bank.

[109]

All but the last, you will observe are Ross & Fischer premium notes, with 3318 direct.

I am going to insist on Ross taking up the premium notes at maturity if they are not promptly paid, as he has other connections to raise the money and should relieve us of all he can knowing the situation. The $3318 note is a consolidation of several on which interest and $700.00 was paid on principal today and I can't say it will be paid at maturity. Ellis did this while I was out and I don't know if they agreed to clean up at maturity or not. We have no financial statement, but Mr. Rutter likely knows pretty closely and personally. I'd say they are better than Jaynes & Wardell. We want you of course to charge them up at maturities—Joke—we might have a balance by that time. I am just trying this out and see what you think of it.

You have some of Coburn stuff and statement. Ellis says this note will absolutely be paid at maturity out of his commissions on apples which surely will be in by that time. I have been over to Coburn's place. This is not bad stuff and he really is in a good conversative business and had margin of liquid capital in business. Not a gambler. Has had lots of experience in the line and has always been more or less successful altho too conservative to ever make a killing.

We will know in a day or two if the sale matter goes thru. They are going to get together tomorrow P. M. S. B. will leave for Spokane tomorrow night unless they ask that he stay altho he has given Ellis power to close deal.

Yours very truly,
(Signed) W. F. BUCKHOLTZ.

Our OD with you increased about 1000 at this end to-day, not counting any of my notes charged up as yet.

January 8, 1921.

Mr. W. F. Buckholtz,
c/o Central Bank & Trust Co.,
Yakima, Washington.

Dear Buck:

The Executive Committee talked over the $11-000.00 note of the Franc Investment Company this morning, but were not favorably inclined towards taking it. They feel that you have other paper down there which is more liquid, and which comes nearer measuring up to our standards.

We have great confidence in your ability to pick out the kind of notes we want, and will ask that you work along those lines instead of asking us to take the Franc note. I did my darndest to get it over for you, but the powers that be could not see me "for dust."

Referring to my letter in regard to liberty bond notes, it may appear to you that Mr. Barghoorn cannot borrow $22,000.00 from the bank there, and I guess in the last analysis that is right, but we talked the matter over with the Bank Examiner, and he told us to go ahead and handle it that way, namely: giving the bank there two notes, one for $20,000.00, and one for $2,000.00. They to discount the large one thru us, and keep the other one in their pouch; the large one to be secured by liberty bonds, aggregating $22,000.00.

Nothing new on the horizon to-day.

The account of the Central Bank & Trust Company is overdrawn to-night $7,434.79. Of course, we want to get this covered at the earliest possible moment. [110]

After writing you last night, I found your pencil memorandum on the makers of the various notes, and we are even better suited with the notes after seeing that than we were by merely looking at the statements.

Sincerely,

W. T. TRIPLETT,

W. Secretary.

January 8, 1921.

Mr. W. F. Buckholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

On looking over our records I notice that a lot of apple drafts for which we have given the Central Bank & Trust Company credit are unpaid, and that in a number of cases more than two months have elapsed.

I wish you would see the makers of these drafts and ask them to give you checks for the amount so that we may clear them from our records, and enter them for collection. I do not expect your bank to put up the money, because I can understand conditions there at this time, but I do think that the people who drew the drafts should "come through."

In this connection, I wish you would instruct the tellers there not to accept any more drafts drawn payable upon arrival of car, except for collection. These arrival drafts are the bane of our existence, and the Bank Examiner is making it rather warm for us on account of the delay in collection. We had a notice to-day that one draft for $1,141.35 which has been outstanding for some time is unpaid, and that the bank is unable to get any satisfaction out of it. This is being charged back to your account, and I think you had better do likewise with your depositor. He should sell the apples or make some arrangement whereby the draft

can be taken up without any further delay.

Sincerely,

W. T. TRIPLETT,
Secretary

R.

January 9, 1921.

R. L. Rutter, President,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Rutter:

As already advised, we all feel that the withdrawals have terminated, and I am more confident to-day than ever that we can get by and liquidate our indebtedness within 90 days, provided of course that the products held here will sell at all at reasonable figures. It is not so much a matter of holding for better markets but a matter of light demand temporarily. We of course all hope to make the sale and Mr. Ellis is firmly convinced it will go thru, but not depending on that and the benefits to be derived immediately, we face the task of liquidation to the limit or bringing on as much pressure as it would be good policy to do without creating a feeling of uneasiness among depositors, whose ears might hear the talk of disgruntled borrowers. [111]

What I want if possible is for you to use your influence towards keeping the examiners away from here for say 30 days. I saw McBride in town one night and expected him in here that following day, but he didn't appear and I think he went out for Sunday. We are getting along fairly comfort-

ably; needless to say, we are busy—busy is no name for it. It would greatly inconvenience us at this time, and would delay such collection progress as we may be able to make. Then too, customers will see them at work in here and that gives another possibility of starting withdrawals, which we don't like at all. As for myself. No one has gotten curious,—I am a new man working in here in Van's place, who just left the first.

You will see my argument. The examiners would do the situation no good whatever and it has possibilities of resulting in disaster. I will greatly appreciate any influence you may have with the department.

Sincerely yours,
(Signed) W. F. BUCKHOLTZ,

Jan. 9, 1921.

W. T. Triplett, Secy.,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Trip:

Subject: Apple drafts.

I have your letter of yesterday advising that you are charging back a draft of $1,141.35 which was drawn 10–25–20. This was drawn by E. S. Small on H. L. Tonnes Co. Detroit, *Minnesota.* That all right. I will get Small in here to-morrow. Tonnes wrote Small that the apples were fine. He has them unloaded and wants more. It seems Tonnes put up bond to RR. Co. to get unloaded. He wrote Small that he would have absolutely nothing to do with the First Natl. who hold the

draft and asked Small to send his drafts to the Detroit State Bank and he would pay them. We wrote the First Natl., to turn over collection to Detroit State but it seems they won't do it; this might do it, but to make sure, I will have Small draw a sight draft on Tonnes, which we will mail direct to the Detroit State Bank for collection with instructions to wire results and if paid we will wire First National to surrender B/L. We should get this one cleaned up within six days and it cuts down the "On Arrival" stuff to $5500. If you can possibly carry this a week or ten days longer, I sure will appreciate it, but on the other hand if you get this loan matter fixed so as to give us a balance, it won't be so bad to charge us and you do what is best for both ends. You understand it will force loans on our books to that extent until returns are received. The shippers have no money on hand altho they are waiting for returns on a few items sent for collection. When the S. & E. and other banks stopt handling these on arrival drafts, it forced the shippers to check out their balances on accounts they had to pay and not getting credit on any more run them out of cash. Then apple shipments stopt, until demands for late apples comes on. There you have the situation.

On the December float which is now less than $15,000, with likely some credits since, I am not alarmed or worried over. These as you know are at sight and payments have been good. Some of this hasn't had time as yet. You might mention to Mr. Rutter that your risk on the apple drafts

in transit is not bad, not nearly as bad as it might be.

Keep writing me. I like to hear from headquarters.

Very truly yours,
(Signed) W. F. BUCHHOLTZ.

P. S.—We have already stopt giving credit for on arrival drafts. [112]

January 10, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Your account has been charged $329.89 to cover the discount on the notes aggregating $39,199.18 which we took for your account a few days ago. Enclosed is a memorandum showing the details.

Sincerely,
W. T. TRIPLETT,
Secretary.

R.
Enc.

1–10–21.

Mr. Triplett:

I couldn't find my copy of the reports on the notes I sent you as collateral anywhere in the bank this morning and thot possibly I had enclosed both copies. Will you see and if so return one copy at once?

It might have been picked up by someone and carried away or the girls may have destroyed it.

I should hate to think that someone on the outside might have gotten it and it bothers me.

The bunch of employees here don't amount to much outside of Lemon the assistant cashier or to be, and the old maid who keeps the savings books and window. I am very much disappointed in Elting. All he thinks about is getting through the day and getting out. He takes no interest in anything and during all these years has learned nothing in general. He is paying teller and on quiet days has time to do such work as reconciling accounts or other details but he don't know the first thing about starting on it. He is married and lives beyond his means, his account is overdrawn over $100.00 and he doesn't seem to be able to catch up and get it covered. I always thot he was good material but it is a case of lack of pep or ambition; doesn't even know enuf to keep his mouth shut on the outside.

Ellis allows Elting and Smith and the other teller to overdraw almost continuously; there are shortages of over $1000 for the year unfound. Van is into the bank for about $180 that we know of and in all there is such a lack of organization and efficiency that I get so disgusted that I would like to fire the whole gang out of here and get new people, all except Lemon and the old maid. Stuff lying around all over thru the night that should be locked up, bunches of uncanceled checks lying out and all such stuff as that. Two of the other four girls are good material and with a little strict discipline could be developt, but what else can you expect of

a ship without a captain. It would not be wise to make any changes just now of course and we will have to poke along but I see a way to get along with one less man and if it turns out that no sale is made and I am to remain here very long, I am going to relieve one employee or give him notice to get another job. Haven't decided on who it will be. In fact, if business doesn't pick up and deposits remain below $500,000 we could weed out two of them if the others would spruce up a little. It's a sad sad story all around and we have to make the best of it. In my opinion, Mr. Barghoorn made a good buy when he took this over, but he didn't get the right man in here. It's too bad. The big borrowers didn't need to be taken on at all. The borrowers are not depositors. We have any number of little business accounts who bring in small deposits every day. Besides that we have a lot of working people and small farmers. The Japs are mighty thrifty and successful and good depositors and there was no necessity to loan to them so much, altho I have confidence in all of the Jap loans. This bank instead of being in its present shape ought to be buying commercial paper from you and keep you busy supplying it. The force could be cut down somewhat and the institution would make very good profits even if deposits remained at $500,000, or less, in less than two years it would earn enuf to charge off everything slow. The deposits would come [113] automatically. These little concerns aren't going to run away over to other banks to make their deposits and there is lots and lots of

this little stuff around here. If you could collect in what a dozen large borrowers owe you would be on easy street, and the whole situation is due to the past nine months management. I admit that it looked as tho deposits would go over a million but that didn't justify taking on all these big borrowers. The money wouldn't burn up and could just as easily all be invested in commercial paper instead, but there's no use crying about spilt milk; there is lots of it spilt and we have to mop it up the best we can.

I tried to call you to-night but couldn't get you. Nothing in particular, only I was anxious to know what had been done on the liberty bond matter and substitution of notes as collateral; also to give you the news of our raise in deposits to-day of $13,-000.00 with $9000.00 in clearings for morning, but Bargy will be here in the morning and he will have something to tell me. Say S. B. is a prince. You did not begin to do him justice when you were talking to me. I have just begun to get acquainted with him.

(Signed) W. F. BUCHHOLTZ.

January 10, 1921.

W. T. Triplett, Sec.,
Spokane & Eastern Trust Co.,
Spokane, Washington.

Dear Sir:

To assist Mr. Blake in checking up collateral the following is now in my possession as agent for the Spokane & Eastern Trust Company:

On collateral note of J. J. Blood $450.00, par value Liberty Bonds various issues.

On the collateral note of O. A. Clark I have a real estate contract signed by Geo. Cry with an unpaid balance of $1110.00, total purchase price of the property being $4000.00.

From Ira Cardiff collateral note I hold certificate of stock, 87½ shares Washington Dehydrated Fruit Company of $8750.00. This certificate was not endorsed by Mr. Cardiff nor have we hypo and the next time that I can get in touch with Mr. Cardiff, it will be fixed up.

On the J. E. Knight collateral note I hold Pacific Dearborn Co. warehouse receipts on the two Clydesdale Trucks, together with insurance policy for $5715.00, loss payable to Central Bank & Trust Company.

On the Shields-Livengood rediscounted note of $2500.00, I hold their own warehouse receipt on a National Sextet Touring Car, in their Seattle warehouse, wholesale cost $4200.00; copy of the receipt, which is in reality a trust receipt, is enclosed. Mr. Ellis says that there is no doubt but what this car is covered by insurance, but the policy is not in our possession. I will try to get this from the manager here as early as possible.

Enclosed is hypo signed by Central Bank & Trust Co., in connection with our note to be secured by customers notes; I neglected to enclose it when I sent the notes.

Yours truly,

(Signed) W. F. BUCHHOLTZ.

B/H. [114]

January 10, 1921.

W. T. Triplett, Sec.,
Spokane & Eastern Trust Co.,
Spokane, Washington.

Dear Sir:

Please send me the following notes, sent you in the batch of $40,890.21, to be held as collateral; after your collateral department has made his records:

B. L. Blood	$ 450.00
Farmers Produce Co.	2861.50
P. C. Foster	200.00
Jose E. Frisque	300.00
R. A. Gray	1000.00
H. Z. Honda	3000.00
Shields-Livengood Motor Co.	2500.00
N. D. Warwick	1654.49
Conrad Weiss	1486.39
Wapato Construction Co.	2500.00

I would like the original notes here for collection in case the borrowers should happen in.

Thanking you, I remain,

Yours very truly,
W. F. BUCHHOLTZ,
(Signed) W. F. BUCHHOLTZ.

B/H.

1–10–21.

/W. T. Triplett, Secy.,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Trip:

We had a nice day to-day with a gain of $13,000 in deposits which includes a cashiers check of

$5000 which will be in in about a week. Our remittance to Spokane totaled $17,907 of which $3169 is sight apple drafts, balance regular bank checks.

Collected only a little small stuff which didn't amount to anything and Ellis took E. S. Small's note temporarily for $5250 to take up some old charged back apple drafts which have been laying around here for some time and then credited back and carried as cash items for another 10 days or so. It is hoped that we will get some credits on some of the drafts and others he has to arrange to re-sell. I don't think Small could get the money elsewhere, altho Ellis didn't go into that with him. This bank has carried him and he does all his business here. Of late his balances haven't been steady altho he is still selling stuff occasionally and now and then makes a good deposit. Has lots of fruit and money due him on shipments tied up and when it all gets in Ellis thinks he can easily clean up here.

The S. & E. account hasn't been reconciled for December and I haven't had time to get at it, but if nobody gets to it to-morrow I am going to try to do it myself. We don't know how we stand closely. We should have a credit balance without the loan for a little bit anyway. As stated, we got Small to give us sight draft on that Tonnes car which we sent direct and charged to sundry banks, credited S. & E.

I am not sending any notes to-night, and in fact am going to quit early for a change. I am won-

dering what you thot about the notes I sent, but will hear from you to-morrow.

Sincerely yours,

(Signed) W. F. BUCHHOLTZ. [115]

January 11, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

I am enclosing a list of the fruit drafts outstanding. You will notice that some of them are a hundred years old, more or less. They are the bane of our existence, and while Ellis and some others may blame us for not taking them, there was absolutely no way under the sun we could use them, and we are sorry we did not clamp down the lid sooner than we did. Four or five of those should be gotten out of the way without delay, and I am going to ask you to do a little work looking toward that end.

If the Associated Fruit Company does not want to pay its drafts, then it is up to the people at that end of the line to take them up and handle for collection. Friend Bank Examiner, who has been with us for about a week, certainly is laying on us hard for permitting you to let them stand out so long.

Sincerely,

W. T. TRIPLETT,
Secretary.

R.

1–11–21.

W. T. Triplett, Sec'y,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Trip:

Kindly charge our account with the L. W. Adams $400.00 rediscount reduced and renewed for $350—30 days—history enclosed.

I am enclosing the new $350.00 note for rediscount again, together with new note of C. A. Rhoades for $900.00, for which if agreeable kindly credit our account. New statement on Rhodes enclosed.

As per your letter of the 10th, we are crediting your *your* account with $329.89 to cover discounts on the $39,199.18 batch. Our remittance to you today again was good and taking in consideration the float of our drafts, we should have a credit balance. Lemon and Smith are working on the reconcilement to-day and we hope to find out how we stand by to-morrow.

Enclosed is statement 1—1—21 of G. E. Friesen whose note you hold as rediscount for $2000.00 the total amount he owes this bank at this time. See information attached.

Yours sincerely,
(Signed) W. F. BUCHHOLTZ.

P. S.—Mr. Barghoorn arrived this P. M. and tells me he signed the $20,000 liberty bond note and we are making the corresponding entry. I have as yet no answer on the 40 odd thousand collateral

notes sent you, and whether you will see fit to put thru a credit immediately.

1–11–21.

J. L. Campbell, Comptroller,
S. & E. Tr. Co., Spokane, Wn.

Dear Mr. Campbell:

I believe the S. & E. is relieved of my salary from the day I left and you [116] likely have a small credit due on the 15th for the first few days of January and whatever it amounts to. Wish you would credit my check account on that day and mail slip of it to Mrs. W. F. Buckholtz at E. 20 5th Ave. Spokane in order that friend wife may know the amount.

Hoping that everything is progressing to your satisfaction.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

P. S.—We have lots of work and things to think about.

1–11–21.

Dear Mr. Triplett:

I happened to run on to your letter of 1—3—21 asking for statements on C. H. Ashman and Richard Frederickson. Neither of these people have been in and the following is the best I can give you at present.

C. H. Ashman is a tenant of S. S. Busch on one of his irrigated tracts. The note is also signed by Busch which adds strength. Ashman has a small equity in a piece of land, which together with mis-

cellaneous chattels likely would show a net worth of $3000.00. They have on this place about $2000.00 worth of clover seed out of which the note is to be paid. The clover seed market is dull at present as there is little demand for it at this time of the year. We don't know if insured or not, but as soon as I can get one of them in, will send you further details.

Richard Frederickson owes this bank $2333.40 all of which is rediscounted with you and due 2—6—21. He has an equity in a place of about $3000.00. This loan is secured by cha. mtg. on some equipment, together with his 1920 crop which consists of 100 tons of hay and 40 tons of spuds. Yesterday some hay was loaded out at $17. A dealer told me some went out at $18 last week. The lowest sold to my knowledge was $14. Figuring the hay at $14 and the spuds at $20.00—(I don't know or haven't heard what spuds might sell for at this time) there would be hardly enuf to clean up, but there are good chances of getting better than $14.00 on the hay. I am writing Frederickson to-day to come in here and we will see what we can do about selling the hay immediately, and will advise you of any developments.

Sincerely yours,

(Signed) W. F. BUCHHOLTZ.

January 12, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Thank you for your letter of January 10 enclosing history sheet on H. C. Davis. The old boy is one of those hardboiled fellows who believes that the only province of a bank is to lend money; that as long as a man is good there is no use asking him to pay up; and that deposits in connection with a loan are out of the question, for a man would not borrow if he had any money to keep on deposit.

He is largely responsible for getting a bunch of loans in the pouch signed by persons who carry no balances with the bank. I think he is a big drawback, but on the other hand you need him in this crisis and it would not be well to press him too hard. I think you ought to make him understand he is not to be a continuous borrower, but is to pay up whenever he sells any stock or any [117] produce, and borrow at other seasons.

He is just as you described him, a first class politician with a lot of influence, and particularly in the livestock lines.

Sincerely,
W. T. TRIPLETT,
Secretary.

R.

January 12, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

You have the C. A. Rhoades matter sized up exactly right. Mr. Rutter thinks that you handled it in fine shape. He is not the kind of a man to press for payment. He owes you such a small amount in comparison with what he received for his products, that you would be foolish to go out and force collection.

On the other hand, if his produce was only worth $5,000 and he owed that amount you should go out and put on whatever pressure is needed to secure liquidation. The kind of people you should get after are those who are continuous borrowers, and who will have nothing left to deposit after their loans are paid. The chances are they will be applicants for new money within a very short time, and the only way to circumvent their requests is to ask them to pay up and go elsewhere.

Regarding Ashman and Frederickson—I think you had better watch them carefully and see that you get returns if the crop is sold. Otherwise, they will be inclined to pay other people, use the money for expenses, and do everything else other than pay the bank.

It is entirely satisfactory to us to handle the L. W. Adams renewal and C. A. Rhoades note. Your account has been credited $1,237.70 to cover

the new notes, and charged $399.77 to retire the old note of Adams.

We are pleased to learn that things have quieted down and that deposits are running along in the regular way. I am not so sure that the withdrawals are all the result of uneasiness on the part of the depositors. Nearly all Spokane banks have had some decrease in deposits since the first of the year, due to the fact that a good many people who have savings deposits have bought bonds or moved away, and they were just leaving the money here until interest was credited up. Our own deposits have shrunk a whole lot since you left, and we are congratulating ourselves that they have not slipped even more.

Sincerely,

W. T. TRIPLETT,

Secretary.

R.

1–12–21.

Mr. Triplett:

Deposits to-day down about $3000.00. Regular run of stuff. Nothing in the way of withdrawals of accounts that amounts to anything. Just a day when nothing large comes in.

Cash collections of notes net, only $600.00. [118]

Everybody appears to be calm, business quiet and nothing exciting occurred: Few cars of hay being loaded out every day but demand weak. Geo. Cyr made an appointment to see me to-morrow. He is a borrower on haps, you have him. In the mean-

time he is going to feel around on the market a little. Will advise you results of our conference tomorrow.

W. F. BUCHHOLTZ.
(Signed) W. F. B.

P. S. —How is Wienss getting along? Selling any wheat? Is the Omah situation doing anything?

1–12–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Trip:

Thanks for informing me as to the telephone rates after midnight. I didn't know this and it may be of considerable use to me.

If you should be having a night session at the bank or be there after midnight and have anything of importance to tell me about, you might call me Room 553 Commercial Hotel and I can talk where it is quiet and not a lot of people around to hear me. It is usually about 12:15 before I get to my room—I don't mean that I am usually in somebody else's room until then. I don't want you to misconstrue my meaning, that's all, as I am usually down at the bank until 11:45 and then mail my stuff on the night train.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

1–13–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Trip:

In regard to financial statement from Ross & Fischer: Ross just got back from Ellensburg and I saw him in the lobby of the Commercial this evening.

He says they are closing up their last year's business and in a few days will have the desired statement and I will forward you a copy when I get, *keeping after them* in the meantime.

Ross also says they expect a check of $5000.00 in a few days and it is quite possible that they will take up the note at that time, realizing the situation here. I also had a talk with him about taking up past due premium notes and made favorable progress on that. Enclosed is copy of J. D. Bridges statement of to-day. You hold his for $200.00 end R. & F.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

1–13–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

Enclosed is renewal of Geo. L. Cyr hop loan for $5250.00 for 60 days, to [119] replace two notes rediscounted with you aggregating $5200.00.

The enclosed history sheet and new statement tell the story. This might be prepaid as Cyr is anxious to sell as early as possible but I made it 60 days as it might take that long for a market to develop.

As per our conversation, I could have split this up, making one note absolutely secured with large margin and the other not, but you know how it is with us at this time. It's like an old girl at 60—what is the use?

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

P. S.—Received credit memo for L. W. Adams renewal and C. A. Rhodes $900, for which thanks. I am glad my action on these met with approval. One of the Cyr notes was here for collection; the other has not arrived. Please cancel and send it if it's not already on the way.

January 14, 1921.

Mr. F. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Your letter of January 12 in regard to the Small drafts is received, and we are not altogether satisfied with the situation. It seems to us that in view of the length of time these drafts have been outstanding, he ought to sell the apples on the open market if the Associated Fruit Company is not going to take them up, and let us clean the slate.

In lieu of that it will be satisfactory to us if you can scrape up enough rediscounts to take the place

of these drafts and let us enter them for collection. We don't want them outstanding much longer. We all feel that there is going to be a good sized loss on Small, and the sooner we get things in shape the better. The apple market, like everything else is slumping, and the longer you wait the greater the loss will be. In our experience the man who gets in first and secures his money comes out on top, and the man who dilly-dallys along comes out at the small end of the horn.

That has been the trouble over there in Yakima. Instead of going after their borrowers last September as per our suggestion, they were too much inclined to listen to the borrowers' tale of woe and his optimistic views as to higher prices, instead of using good judgment.

Sincerely,
W. T. TRIPLETT,
Secretary.

R.

January 14, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Whose receipt does the County Treasurer hold for the Liberty Bonds which were forwarded for conversion? If it is issued by the government or you have a form of receipt from the Federal Reserve bank for it, we see no reason why we should not trade you $10,000 worth of Liberty Bonds for your receipt, and hold the latter until returns are

received, provided the bank will give us a written agreement to turn the bonds over to us as soon as they arrive.

Sincerely,
W. T. TRIPLETT,
Secretary. [120]

R.

January 14, 1921.

Mr. W. F. Buchholtz,
Care Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

To-morrow your account will be credited $40, being your salary for the first six days of January and a duplicate of the deposit will be sent to Mrs. Buchholtz, as requested.

We have had the examiners with us ever since you left, you no doubt know, and we seem to have enough work ourselves to keep us busy. I haven't heard of anyone looking around for something to do for some few days.

Sincerely,
J. L. CAMPBELL,
Comptroller.

JLC: MS.

1–14–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Washington.

Dear Mr. Triplett:

Nothing new to report to-day in particular. We had a regular day although our deposits dropt

about $8000.00. This is not a large fluctuation for the volume we handle, but the trouble is there are more downs and ups. Didn't collect anything to speak of to-day although got some statements and made a few renewals.

Woodcock will likely pay us $1500.00 to-morrow or Monday, which he said he would. This however, is full payment of a note held in Seattle. You can put considerable confidence in the paper with his name on it, of which you have $12,000. His turn over of cash is good and he deposits bunches of checks which would make you think he was in some business in town. He did not put all his assets in his statement and he is believed to be worth a half a million and not all his assets are of a slow nature either; in fact, we could get every cent on the paper he is on as he can get it elsewhere anytime, but you see he is not only on the board here but is one of the substantial fellows in the bunch of prospective purchasers. In spite of this, you can be reasonable sure to get some money at maturity from him; in fact Ellis says he will pay all of it.

You mentioned the Grangers Whse. Co. $6000.00. I agree with you that the load is too heavy but likely you were under the impression that this business is conducted in Granger which is not the case. It is in the same block that the bank is, and consists of general mdse. and produce business, owned and operated by a bunch of farmers.

Keep writing me. It's great to hear from home. It strengthens my morale and it is indeed a pleas-

ure to pause for a moment thru the day and open and read them. I am going to use you all I can in this work, and knowing that you have plenty of other matters to look after, I appreciate the time you give me.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ. [121]

1–14–21.

J. L. Campbell, Comptroller,
Spokane & Eastern Trust Co.,
Spokane, Wn.

Dear Mr. Campbell:

Please send us a statement of our account with you with vouchers up to date, and from now on have them sent twice a month, on the 15th and last.

Two of the boys have been working on our reconcilement of account for several days and as yet not reached a balance. We hope to get this completed soon and will send you return sheet. Unfortunately a great bunch of stuff consisting of charged-back apple drafts, costs on these, wires, collection and exchange charges, etc., etc., have run on without attention for so long that it nearly necessitates the employment of an expert to ferret out all the differences.

Thanking you, and with personal regards,

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

P. S.—Since writing the above I have watched the boys work on it for a little and I see they have a lot of December stuff to check up as yet. Until

further notice, I wish you would have someone enclose a slip of our balance each night until we get it straight. I can then estimate outstanding drafts and other large items and get some idea as to how we stand from day to day.

January 15, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Referring to your letter of January 13—I am not altogether sanguine about the Rhoades matter. The price of apples is something yet to be determined. My thought in writing you was that if the value of the apples was very little more than the loan, there was not much use in taking chances and mincing words; but if the price of the apples exceeded the loan several times over, as it apparently did, you would have been foolish to go after the loan.

The trouble with apple dealers, hop dealers, and any other dealers that we know anything about, is that they are hoping against hope that the price is going to increase or continue where it is. They are merely kidding themselves. [122] The price of all products is on the down grade. After the Civil War values declined steadily for thirty years. You know what happened to what this year. The apple men have been fortunate so far in that the price has not slumped proportionately as much as other products, but our friends in the Wenatchee country tell us the market has quieted down

to a whisper, and that it is next to impossible to get a bid on any amount of apples. This is the beginning of the slump. A banker should advise his customers to sell their products and get out from under the load.

This goes for Cyr as well as anyone else, although in Cyr's case you want to get all you can out of his crop. At the same time, you don't want to let the market slide out from under him. We have renewed the Cyr note, but shall expect it paid at the next maturity.

I think you can understand our position in the matter, and while it may appear a bit arbitrary to you, these things will hang on for ages if somebody does not put on the pressure that is necessary to get results. The trouble with all of us is (and this goes for me as well as anyone else) when we get among the farmers and see the actual produce, we are inclined to take their viewpoint because we can see the stuff and know something of the value. On the other hand, conditions are entirely different this year than ever before. We are on a constantly declining market from which there is little prospect or hope of recovery for some time. The tight money market alone would tend to hold prices down if no other feature entered into it. There isn't enough idle money in the world to buy any great amount of products and all purchases are on a week to week or hand to mouth basis. The butcher, the baker, the candlestick maker can't see over a week or ten days in advance. Consequently they don't lay in the supply of goods they formerly

did and are buying in driblets. You know what that means. When any of your borrowers begin to talk about holding for higher prices it would be just as well to turn a deaf ear to their appeals.

As regards H. D. Smith, it is all right for him to talk about relieving you of his loans in case you get uneasy, but unless conditions in Yakima are entirely different from what they are any place else, he will not find it so easy to make good on his promise. Apparently he is sound and in good shape, but when a man talks about going across the street and borrowing money to pay another bank he does not know what he is talking about in these days. All the banks in Spokane have had attractive business put up to them if they would lend money to pay off some other bank, but when it came to a show down they did not get the money.

We thank you very much for the $2,500 he paid and for letting Herb continue to carry his part of the load.

Sincerely,
W. T. TRIPLETT,
Secretary.

R.
Enc.

January 15, 1921.

Mr. W. F. Buchholtz,
Care Central Bank & Trust Company,
Yakima, Washington.

My Dear Buck:

Enclosed you will find statement of account of the Central Bank & Trust Company, as of the close

of business January 14, and as requested, we have placed your name on our mailing list and hereafter you will receive a statement of your account on the fifteenth as well as on the thirty-first. I have also asked Miss Cannon to furnish me daily with a memorandum of your balance and I will endeavor to see that you get it all in due course.

You certainly ran up against a mess all right but after you once get it straightened out and know where you are, it won't be so bad. The party who [123] was in charge of the reconciling end of it I am sure cannot have given it much time or else it would never have been in such shape.

Sincerely,
J. L. CAMPBELL,
Comptroller.

JLC: MS.

1–15–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

I note that Chief Snider is still marking the collection slips on rediscounts sent me for collection as follows:

"Will charge your account at maturity."

You advised me that this would not be done, and I hope it will not be. I am very anxious to keep our account intact and if rediscounts are charged up in this way, it just simply can't be done as it requires time to get these items renewed or collected.

If O. K. be sure and see that Chief doesn't do it.

Yours very truly,

Sincerely,

W. F. BUCHHOLTZ.

(Signed) W. F. BUCHHOLTZ.

P. S.—Mr. Barghoorn left for Spokane this P. M. and he can give you late information. WFB.

January 17, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Enclosed is a copy of our entry in connection with the H. D. Smith payment of $2,500.

I do not know whether you adjusted the interest or not, but this will give you an idea as to what was done.

Sincerely,
W. T. TRIPLETT,
Secretary.

R.
Enc.

1–17–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

Collateral notes only.

Enclosed find renewals as follows: (Original notes.)

B. L. Blood $400.00, secured by U. S. bonds par

$450.00; note due in 30 days with authority to sell at maturity unless taken up by them. [124]

H. Z. Honda $3000.00. Chattel mortgage hotel furnishings.

The P. C. Foster $200.00 note held by you as collateral was collected in cash today. I have not made entry to give you this and with the $50.00 reduction on Blood cuts your total collateral down to $29,966.72 as it stands, but I have a couple more entries to make on collateral notes, people in after hours and tomorrow will send you something more to cover. It is necessary that we substitute other paper for collateral notes collected at present which I trust is agreeable.

On the above B. L. Blood note, I am retaining $450.00 in liberty bonds for you. Blood begged so hard and assured me that he had money enuf coming to pay this note in full and keep his bonds, that I allowed him another 30 days. If he doesn't come thru by maturity I will forward the bonds to you for sale. He expects to get some money in about ten days, but I think it's bunk and if he doesn't, it is understood that we sell the bonds without further negotiations.

Yours truly,
W. F. BUCHHOLTZ,
(Signed) W. F. BUCHHOLTZ.

P. S.—Honda couldn't pay anything more than interest this time but assured me that by next maturity would make substantial payment. It is possible that he is helping some of his Jap friends and I am going to watch his account.

1–17–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wn.

In General.

Dear Mr. Triplett:

Thank you for your general letter of the 15th.

About that fellow Rhodes, I agree with you. I'd sell enuf now to clean up even tho I had $10,000.00 worth of apples and owed only $900.00, but with Rhodes it is different than many others. His stuff is 75% extra fancy, in good shape and size. He told me he could get $2.00 but on account of having such good stuff felt he could afford to wait a little, especially since his indebtedness was light. But, you take some of the other fellows who have 5 tier apples and C grades and poorer, they haven't any offer at all for any amount. These are the birds that I think should take what they can get as early as possible; in fact every borrower whose ratio does not show a large margin and owes considerable, should not wait one moment.

You take the hop fellows. Right now there is practically no bid for hops. Such brokers as have connections for handling are on the lookout for hard-up hop growers and want to buy at 25¢ and speculate, but from what I can learn from a number of sources, it is reasonable to expect a market in 30 to 60 days. The First National has some hop paper; they don't expect anything on it until March and by the way, they are a long ways from being on easy street themselves with steadily de-

creasing deposits, altho they hope to get a good boost in March. I haven't bumped into many fellows as yet who are standing us off on the idea of holding for better markets, but in many cases there is hardly a market of any kind on some things. It is true that a little stuff of all kinds is being shipt out right along, but the volume is sickening, and we are all hoping that the apples will clear out during the next 60 days. Altho I expect to keep pounding along getting what I can, I don't expect to do any great volume of liquidating until February or March. I am figuring on from $100,000 to $150,000 out of hops and apples during the next 90 days. If these two items don't move, we are going to have some mighty hard sledding and it won't be this bank alone.

With reference to H. D. Smith with whom I am getting pretty well acquainted, as [125] he lives at the hotel, he did not say how he would pay if we called him. I think he would sell. You know he is a buyer for Cohen & Co. of Chicago, has some capital of his own, and this business is on his own account, and I am inclined to think he knows where he can sell his stuff and what he can get. Altho, I admit this is speculation, he is not the rank kind that Eddie Small is, and doesn't load up with more than his capital will comfortably handle. He told me that he could sell at 20¢ profit over all costs on what he has in storage, but that it was too early to sell the quality of stuff he held. He says the outlook on small and inferior stuff is not encouraging, but that he was in close touch with the

Chicago people from whom he gets night letters every day and that he wasn't losing any sleep as far as his personal business was concerned. If his account didn't amount to anything, I'd sure put on the pressure but he always has a balance which usually commensurates with his borrowings, and if any items come back the money is there to cover, and in fact I might add that it is a pleasure to transact business with him, and I am not doubting that by the end of 60 days will see him cleaned up, which is a lot more than I can say of some others.

I don't want you to feel that I am drifting off into an alley of thot which might not do this situation the most good and I agree with you to the letter on the several subjects touched on, but what did the wheat fellows do when there was absolutely no bid whatever for a short period. There was nothing to do but wait until buyers did come back on the market. Moss of Fairfield told me that for a week or so they couldn't sell wheat for 50¢ a bushel; that there was no bid at all and they had to wait. The situations of some commodities is just that. In fact I have met with little stubborn resistance on this argument on the part of growers. If they have any stuff to sell, they will sell even tho the price is down, but they want cash. The buyers and brokers are loaded to the brim with stuff; the banks are all holding them down and until the crest runs off a little, cash bids will be weak and few for the commodities. Many of the growers are pestering the life out of fruit dealers trying to get money

due them on stuff already sold. We have some of these growers who have accounts receivable. Many of the dealers are responsible and will pay when the peak begins to simmer down, but if they can't borrow from the banks they have to wait for returns and there is nothing to do but tell the growers to go to their banks and tell them these conditions, and the banks can do nothing but carry them along.

We are still getting in a little bit of money each day on our loans, but it is sickening the way things drag on.

Our statement on the 14th showed about $6000 balance, and I note that you charged the Barney note of $3500 along with some others to our account. Our floating drafts were about $12,000 on that day and altho our remittance to-day will help about $8000 we will be in the red again unless it keeps up good. We gained $14,000 in deposits to-day, $6000.00 of which was in currency, which of course is refreshing, but for several days past it went the other way strong, our low water mark in deposits being $440,000, Saturday, to-day, up to $454,000.00 again. The deposit end of the business is all quite regular at present and it is reasonable to expect that they will at least stay above $425,000.00 unless we can get more county funds which will likely be towards the end of February or first part of March. At that time, if we have the collateral, it is possible that we might get $50,000.00 additional in county funds. If we should get something of a raise or temporary spurt by March 1st from the general run of business, together with

what liquidation may be made by that time, I hope we will have a little breathing spell for a few minutes from the reserve standpoint. Our actual cash reserve when you get down to the bottom of it has been running from 6 to 10%; in fact scarcely more than the cash on hand in the bank, as actual collected balances are usually an unknown animal around here usually offset by what our books show as overdraft with you, the balance of due from sundry banks consisting of uncredited apple drafts gone hay-wire. That E. S. Small business is enuf to drive a fellow to drink. By the way, I misinformed you as to his indebtedness here. He is on the books as a [126] borrower at this time of $16,250 instead of $20,250. The girl posted a note to his account in error. The *the* $16,250 add overdraft of $1900.00, stranded fruit drafts which will come back on us of $5000.00 and you have a total of about $23,000.00 Small actually has a bunch of stuff consigned East trying his best to sell it and take a loss on part, but to date hasn't gotten any money on it, and the come-backs of the apple drafts, wherever there is a chance, we are arranging to file R. R. claims in our name. Just how he will come out, we don't know at this time. Small was in this P. M. and wanted to go over stuff with me, but I had four borrowers waiting to see me then and he had to get back to his business. I had a real day's work to-day; from ten o'clock on I was taking statements and figuring with borrowers steadily, and when I got to the end of the bunch, I looked at the clock and it was quarter to four and

felt pangs of hunger as I eat a light breakfast, so went out and had a lunch; worked a couple of hours more and then went to the Commercial and had a good feed to the tune of $1.65 and Tales of Hoffman.

Ellis did some work to-night which will help. He wrote up a large pile of letters on past dues, asking them to come in. I hope it brings results. It's quarter to 12 and I have to beat it and get my stuff in the mail. I promised Mr. Barghoorn I'd keep him advised as to how things were going. No time to-night and if you show him this it will give him some idea.

Sincerely yours,
W. F. BUCHHOLTZ.
(Signed) W. F. BUCHHOLTZ.

January 18, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Referring to your letter of January 15—we have instructed Mr. Snyder to make no charge against the Central Bank without authority from you. However, in some respects the system is all wrong.

You ought to arrange it so that there would be a certain amount of new paper coming in to take the place of the old paper as it matures, so that we would not be under the necessity of waiting for you to obtain renewals—something which is at times rather difficult.

Unless a system of that kind can be worked out, your humble servant and a lot of the other employees of the bank will be working overtime trying to get the past due notes in shape, and to keep away from the wrath of the Bank Examiner.

Sincerely,

W. T. TRIPLETT,
Secretary.

R.

1–18–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.
In General.

Dear Mr. Triplett:

Deposits held about even and collected in a little better than $2000.00. Am scheming and figuring on how and what to send you as I know if we have any balance there, it represents floating drafts as our books show quite an overdraft, but will be sending you something before the week is up.

Well, it became necessary to have a confidential talk with Ellis to-night in an endeavor to ascertain his ideas and as to how seriously he took my presence and position. You understand things have gone pretty smooth between us for a while until to-day or this evening. It was like this: Mr. Barghoorn mentioned to us that the Wapato Construction Co. would get $3000.00 in a day [127] or two; in fact I mentioned it in one of my letters. This didn't come promptly and altho I was on the lookout for it, I failed to notice that the deposit was made yesterday, the 17th. It was an under-

standing with the bank that when Wells got this payment, the bank was to get part of it; in fact the bulk of it. Wells agreed to that, and Mr. Barghoorn wanted us to see that we did get some of it. Ellis knew the deposit was made and saw Wells make it, so as soon as I discovered it to-day, I jumped him about it since Wells had already checked it down to $2100.00 by close of business to-night and nothing on our notes. Ellis said Wells didn't say anything about his notes (both past due) but mentioned he would be in to see him to-night. This was before six. Right then, I plainly told Ellis that if Wells didn't show up to-night as agreed, I would charge his account with $1500.00 or half of the deposit and endorse it on his note, advising him of it and informing him that we would not tolerate his overdrafts—his account was overdrawn before the $3000.00 was deposited. Ellis didn't say much to that, but agreed that Wells was perfectly willing we should have a part of the $3000.00. So far so good. Well to-night about 8 Wells sure enuf showed up. Wells being well acquainted in Tacoma, the subject drifted to the Scan. Am. Bank and the people in it and the causes, etc., which lasted about half an hour or so and then drifted into his work and the collection of what was due him. Finally it appeared Wells was about to go and thinking that nothing would be done, I mentioned that since he was here, why not get his notes in shape. Wells said good. He would rather do it now than tomorrow when he would be busy. I dug up the two notes 2500 and 4000, both past due and turned them

over to Ellis. By the time I got the notes, Wells had made out a check in blank for $2000.00, which was lying on Ellis's desk, and I at once thot it was payment on notes. I didn't pay any more attention to the dealings and went about something else. When Wells had gone, I found that both notes were renewed just as they were with interest paid only. I inquired of Ellis how it was and what the $2000.00 check was for. Well, the check was just to show his honesty and desire to protect the bank inasmuch as his balance would always be in our charge and if we saw fit, we could draw it any time; in fact kept his account as security if we wanted it. Naturally, I began to get warm under the collar and asked him to give me an explanation as to why he did this after Mr. Barghoorn had mentioned the matter, and I had emphatically told him a few hours before that we were going to get $1500.00 of that $3000.00. I would have said nothing had it been $1000 at least. He hummed and hawed and said that Wells would have enuf in 15 to 20 days to clean up the entire $6500.00, and that he thot when I mentioned to get the notes in shape that it was agreeable to me to renew them and if it wasn't why didn't I speak up and talk to Wells. Of course I had to explain that in any case where he was already negotiating with a customer to the point or granting renewals that it was not my place to horn in and say no we won't do this or that, and when he already knew what the program was, it would be much more diplomatic for him to handle the customer and in the end, I didn't want to hu-

miliate him by riding over him in the presence of a customer; that that wouldn't do and I began to get warmer and plainly told him that I had been thinking that he and I could work together and that he wouldn't go ahead and do things without my knowing it or against my wishes; that in this case he didn't even tell me that Wells had made the deposit yesterday when he knew it and then in the end deliberately did the opposite of the policy and plans I had laid out to his knowledge and even at the request of Mr. Barghoorn. He came back with the statement that I shouldn't criticise; that there had been piles of criticism thrown at him, etc., and for me to cite one instance other than this that he had not followed out my ideas. I replied that I was not driving at anything else he had done, or had not done, but was talking about this deal to-night and what I wanted to know and get at was to ascertain whether or not he was going to take my plans and policies seriously or not, and if he wasn't I wanted to know it right away. He kept dodging and squirming around the issue and we weren't getting anywhere. Finally I asked him if Wells had argued that he absolutely needed every dollar of it to finish his job and that it would be impossible for him to spare any of it. (That is the funny part of it.) He said no, he didn't; in fact, he mentioned that he wasn't going to use a dollar more than he had to and expected to keep a balance of over $1000.00 on hand until he got his estimate the 26th—which I know he won't do. Checks came in thick to-day [128] and he will write out a lot more to-morrow and the $3000.00

will be scattered in no time. I failed to get the idea of leaving the $2000.00 check which Ellis said he did voluntarily, but that it wasn't understood to go on his notes. Well, after jangling a while he said Wells was coming in again to-morrow and he would ask him to give him a check of $1000.00 to apply on his notes and ask me if that would be satisfactory. I said "Ellis, if you have granted him renewals on all of it, would it be good policy to change your mind over night and the next day ask him to pay $1000.00?" Well he thot he could get by with it smoothly and that anything was alright with Wells.

Now what do you know about such a case? I have him sized up as a banker who lets his borrowers manage their own credits. Of course Mr. Barghoorn's strict instructions to make no loans whatever has held him down and it is a mighty lucky thing that it came to that when it did. We have had enuf forced on to us since.

Knowing that it is easy to criticise and tear down a fellow when he's in a jackpot, I have tried to look at the man's good qualities and exaggerate the factor that markets went against him, together with shrinkages in deposits, when it wasn't expected, and all those things, but right now I am firmly convinced that he has no backbone or there is something radically wrong and the man not only uses poor judgment but is dangerous in a bank. That's pretty strong and someone might say that of me before I get thru with my banking career, but if it ever comes to that and several bankers in high

positions who have made a success will say that, including the banking department, I think I will admit that I am a failure in the line and if my presence is desired I will still stay and do all I can. With him it is different. He still thinks that he knows what he is doing and made the statement to me to-night that their condition is the result of circumstances over which they had no control and that he Ellis had done everything possible to better things and that he didn't think anyone else could have done more than he has done, and everything you bring up, he has an alibi for, and says the criticism is merely prejudice, etc.

I said "Ellis, you are all wrong. You have 10 borrowers owing you an aggregate of over $100,000.00 right to-day and you don't need a single one of them." To that he replied that it was business of their local directors and stockholder and approved by the directors and that Millichamp had brot in the Wapato Const. Co. account and this and that. I replied to h–ll with your local directors and stockholders; instead of being a help to you, they are a bunch of heavy millstones, every last one of them. They are not bankers and don't see the situation and it's up to the cashier of a bank like this to tell them at the board meeting what is what and that you can't carry the loads they are shoving on to you, and I haven't seen one slight effort on the part of a single one of them to relieve you of what you are carrying for them. There is Millichamp $13,000. Woodcock $12,000. Ross & Fischer $5000.00. Wapato Const. Co. $6500.00 for almost a year—

brot in by Millichamp, who thinks he did something for the bank, and a lot of other heavy borrowers.

As far as Ellis is concerned, I have made up my mind that you and Mr. Rutter have him sized up about right. If anything your opinions are too good and you have too high a regard for his ability if anything.

To end our argument and conversation, we both agreed that it was desirable that he stay on the job for effect, and I added that I hoped strongly that the prospective purchasers would buy the institution and bring enuf deposits to take up all indebtedness and clean up with the S. & E. and stay out, and that as the new people had expressed a desire to have him remain with them, I wished him and the bank every possible success in the world, but in the meantime, while I was here, there was no sense in the bank paying my salary and heavy expense if he was going to pull any more stunts over me like this one; that I had lots of other work that I could do and didn't need this job as far as I was concerned, but that I had been sent here to help liquidate and that results were expected of me and I wouldn't stay without [129] his recognition and co-operation. I had ripped him up pretty severely, keeping in mind that we need him still but feeling that he has nothing in sight and Lord only knows how bad he wants to stay and make some people think he knows something. He finally came part way, appreciated that what argument we had had in the past had taken place when we were strictly

alone and the fact that I hadn't once jumped him in the presence of any of the help or customers and added that he would see that nothing of importance was done over my head again and was willing to work in harmony with me and tried his best to smooth things over and we parted in good spirits and I think I accomplished something thru our long argument. Whether he takes it seriously or not, I don't know. I wish someone would analyze this fellow for me. It's beyond me. He is different from any human being I have ever chanced to work with. I have made up my mind that I need to watch him closely each day, or the first thing I know, he will let another $1000.00 get away.

Well, it's me for bed. I am merely writing you these things occasionally to put you in position to make recommendations and suggestions. You have had lots of training and experience in discipline while I have not; at least I have accomplished nothing in that line.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

1–18–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

I want to get you some notes in shape for rediscount to cover the O. D. just as fast as I can get the charged-up ones renewed or collected, and complete

information to cover them. This goes slow however. I have seen Barney on the $3500 as yet.

Enclosed are two little ones as follows:

W. G. Linse $300.00 due 3–18–21

Jos. E. Frisque $200.00 due 4–17–21

the latter secured by U. S. Liberty bonds aggregating $250.00 which are enclosed. Kindly have Mr. Blake attend to conversion of the bonds.

Both of these notes will be paid in cash at maturity; statements enclosed.

I wish I had about $20,000.00 of stuff like this. Kindly credit if acceptable and advise details.

Yours very truly,

W. F. BUCHHOLTZ.

(Signed) W. F. BUCHHOLTZ.

Registered.

P. S.—Don't laugh. Every little helps, you know.

January 19, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Prepare yourself for a shock. Day after tomorrow your account will be charged with the six Associated Fruit Company drafts which have been outstanding for so long. The enclosed telegram is the answer.

We are hoping you are fortunate in getting the old boy to dig up, but are [130] not entirely sanguine over the matter.

Sincerely,
W. T. TRIPLETT,
Vice-President.

R.

January 19th, 1921.

W. T. Triplett, Sec.,
Spokane & Eastern Trust Co.,
Spokane, Washington.

Dear Sir:

Enclosed is original note of E. F. Burrill for $600.00, together with late financial statement, from which you will observe will not be collected until 1921 crops are realized. The note is secured by chattel mortgage held by this bank, covering all 1921 crops on ten acres of orchard and alfalfa, together with one Chevrolet touring car, two farm horses, two milk cows, wagon, plow, harrow, ditcher, two cultivators, and a disk.

History of the renewal is enclosed.

I am submitting this as *collateral* to make up several small payments collected during the past two days.

Very truly yours,
W. F. BUCHHOLTZ.
(Signed) W. F. BUCHHOLTZ.

B/H.

P. S.—It is necessary to give you some of this from time to time for collateral purposes.

1–19–21.

Mr. Triplett:

What did you do with the Franc Inv. Co. note of $11,000.00. According to my records you still have it. Would suggest that you enter it for collection there at the same time holding it as security to overdrafts if any.

To confirm our records, kindly write us acknowledging receipt, or send collection receipt.

Yours very truly,
W. F. BUCHHOLTZ,
(Signed) W. F. B.

1–19–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

COLLATERAL.

Dear Mr. Triplett:

I have taken out the Wapato Construction Co. note of $2500.00 from the collateral to bills payable. In substitution thereof, I offer the following:

B. L. Chaney 1000.00
Statement & History
S. L. Allen 1984.20
Statement

You will observe the former is signed B. L. Chaney Livestock Co. and endorsed B. L. Chaney. The corporation is still in existence. Its only assets are the [131] 19 head of cattle, with the $1000.00 note against them. Chaney is arranging to dissolve them as he and wife are the only stockholders and in reality considers the whole matter as

his personal, but had him sign in this way to cover the point.

I have hopes of getting something on the Chaney note by maturity as he wants to get it out of the way. On the Allen proposition, there is a wide margin for payment out of 1921 crop. Allen is perfectly agreeable to deal with and I will have the chattel cover his entire crop for 1921 and then altho I admit it is very slow paper, yet I would say it is reasonably secure.

If the swap is agreeable to you, kindly change your collateral records accordingly and advise.

Yours very truly,
W. F. BUCHHOLTZ.
(Signed) W. F. BUCHHOLTZ.

1–19–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.
General.

Dear Mr. Triplett:

Not much special to-day. Deposits dropped about $3000.00. Drafts on you over to-day's remittance of about $6000.00 with $9000.00 clearings on hand for to-morrow morning. Collected about $2000 in cash on loans, which is over our average of late.

On the Lowe State Theatre account, it is not so bad. Last week they ran behind only $1004, and we got our wire for credit the following morning. In fact we are safe on this as they keep three to five accounts and the pay-roll and expense account

is the one which runs short and usually there is enuf money in others to cover the shortage with good deposits every day and should there be any delay or stop to the thing in New York, we could immediately refuse to give them credit for the shortage slip and would be covered for what we were out in any case. In fact on the average I think they would have about $4000.00 average balance; sometimes much more. For instance they have Madam Pavlowa this week with a special account. It is now over $3000.00 alone and settlement is made at the end of the week and the account all told is not so jerky but to be of some value. Especially right at this time they bring us lots of currency and silver.

Herb took on the $6500.00 H. D. Smith paper without a murmer for which we are grateful.

As a whole, I can't say the situation is getting any worse of late, but it seems that actual cash is getting scarcer and scarcer. Every kind of a deal is always paper, if a fellow sells anything he gets paper or credit on account with a promise to pay soon. Lots of apple growers can't get their money from dealers and things just drift, drift on. I am not talking it or wish it on to myself, but it appears that right at present conditions are getting from bad to worse. Of course the old timers around say you can't expect anything in January and that things don't move around here until Feb., March, and April. Here's hoping.

Sincerely yours,

(Signed) W. F. BUCHHOLTZ. [132]

1–19–21

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

I submit the following notes for rediscount and credit:

H. C. Schumacher & Sons	$ 600.00	due 3–2–21
Wapato Const. Co.	2500.00	due 2–6–21
Wapato Const. Co.	3000.00	due 2–6–21
Jerome Lewis	4600.00	due 3–20–21
	Total $10700.00	

Schumaker note unsecured, financial statement 1–19–21 Wapato Const. Co. I think is in pretty good shape with prospects of full collection at maturity. History on transaction enclosed together with assignment of amount due on school contract, all told 5 forms.

Jerome Lewis, secured by tax certificates, you know about as you have had it and this is renewal, history enclosed. I know you aren't keen about this. I have the tax c d's in my possession and they total amount shown. We might get considerable on this in 60 days and might not, but in the end I believe the security is good. It is made up of a long list of small items of from $150.00 down and as these are paid, the county treasurer gives Lewis a check and he applies them on the note. During the last 60 days there has been only about $150.00 applied, but Lewis thinks the note will be half absorbed by maturity at least.

I hope you can get this on the books without de-

lay as we will need it to meet that $17,700 draft which will likely reach you Friday.

I will send more as soon as I can get it in shape.

Sincerely yours,

W. F. BUCKHOLTZ.

(Signed) W. F. BUCKHOLTZ.

P. S.—You will observe that I made end. of 1000 on Wapato Const. Co. to-day. The Jerome Lewis note is renewal of note you had. The rest new.

1–19–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

Your letter of the 18th received with reference to charging back rediscount maturities. I fully agree with you that the system is all wrong. It is worse than that. It is rotten, but for the present and no doubt for some weeks, it will remain a question of which is preferable to you—overdrafts or past-due rediscounts. I would like to increase our rediscounts about $20,000.00 and get a balance enuf ahead to cover charges of maturities, but would you consider stuff that will not be paid until 1921 crop returns are in? There is a limit of the liquid stuff and if the maturities are charged up and we have 10 to $15000.00 of it on our books continuously for collection and renewal—you can't keep it down closer; needless to say I will keep pounding away at it with all possible speed.

I know our O. D. was covered to-day; besides I will get out some notes for rediscount in to-day's mail, but keep a stiff upperlip when that $17,700 draft to Seattle Natl. hits you about Friday; in the meantime, we may have some good remittances; to-day was light, altho we have $9000 for clearing in the morning. We collected a little over $2000.00 in cash to-day on loans, but the situation is largely still in a kind of deadlock. [133]

The slip showing O. D. the 18th of $6755.25 received. If our $18,000.00 remittance reached you to-day as it should have covered temporarily and in the meantime I am sending what I think is the best I can scrape up and will continue to send more.

Yours truly,
(Signed) W. F. BUCKHOLTZ.
For Cashier.

January 20, 1921.

Mr. W. F. Buckholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Subject: Brown. Sheep man.

We got you the first time. The matter was discussed in our Executive Committee, and I also had the pleasure of talking it over with our attorney, Mr. B. H. Kizer.

If it were possible to do so, our thought would be for Mr. Brown to go somewhere else to get the money and pay you off. Under present circumstances that is impossible, so the only thing to do

is to "see him through" by putting up the $600 that is needed for shearing and lambing purposes. As Mr. Brown is now coming to you for assistance, this is the time for you to tie up everything he has so there will be no question about the ultimate payment of the loan. We feel you should get a chattel mortgage on his entire bank of sheep amounting to about eleven hundred head; that the mortgage should recite the working arrangement between him and his father-in-law, and that said father-in-law should either in writing or before witnesses who make an affidavit, state the facts of the case as far as he is concerned.

In other words, Brown's ownership of the sheep should be established beyond any question of doubt. In case the old man won't sign, then have Brown issue an affidavit setting forth the facts, have it witnessed and regularly sworn before a Notary Public.

This is about all there is to it, and we feel confident we can leave the matter in your hands for action—our only thought being that Chambers should commit himself so that there would be no misunderstanding.

Sincerely,

W. T. TRIPLETT,
Vice-President.

R.

January 20, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Subject: Gray and Barr notes.

Renewal satisfactory. Your account has been credited $2,880.75 to cover the proceeds of the new notes, and charged $2,900 to retire the old ones.

The main thing as we see it is to watch these boys and not let them be too optimistic about future prices. You no doubt realize that the market on everything is slipping and that at best it is very, very slow. There is not enough idle money in the world to buy any great amount of produce, and on top of that the day to day and hand-to-mouth market is not conducive to higher prices.

Sincerely,
W. T. TRIPLETT,
Vice-President. [134]

R.
Enc.

January 20, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Subject: M. B. Campbell loan.

He owes too much in comparison with his liabilities, and in our opinion you ought to get yours while the getting is good. He is not the sort of customer who will ever be of much value to you,

for by the time he pays a couple of thousand a year interest on his indebtedness and pays his expenses of operating, he will not have enough left to become a valuable depositor. The fact that he has borrowed from another bank is almost sufficient to cause you to sit up and take notice.

I would say collect,—unless he gives you warehouse receipts for a sufficient amount to cover your loans, and he should not place the value of the apples at over $1,00 per box. At that you may get stung. Optimism is a fine thing but we would rather have the money. If he thinks he can get $2.25 or $2.50 a box and can find someone else to finance him, that is the thing for him to do. You cannot depend much on the judgment of a man who this year sold his crop and bought tractors or automobiles, and increased the improvements on his place. If you can get the tickets, of course we will renew for thirty days with the understanding that he pays at maturity.

Messrs. Ellis and Barghoorn both seem to feel that if you put on the pressure too hard the borrowers will begin to talk about the bank, and to some extent we feel they are right,—but on the other hand, fear is about the worst thing in the world. It causes a man to neglect his business and to almost crawl into a hole and pull the hole in after him. The fellow who goes on about his business and does what is right, having the diplomacy of which we well know you are possessed, is bound to come out on top, and I have not the slightest

idea but that you can pull things out along those lines.

Sincerely,

W. T. TRIPLETT,

Vice-President.

R.

January 20, 1921.

Mr. W. F. Buchholtz,

Central Bank & Trust Company,

Yakima, Washington.

Dear Buck:

Subject: E. F. Burrill note.

We have accepted this as substitute collateral against your $20,000 loan. I notice you do not say "security"; you merely used the word "collateral." Nuf sed. However, there are some things we have to make the best of.

The only thing we don't quite understand, is why when the collateral notes are paid you do not apply the amount on the loan instead of substituting something else.

Sincerely,

W. T. TRIPLETT,

Vice-President.

R.

January 20, 1921.

Mr. W. F. Buchholtz,

Central Bank & Trust Company,

Yakima, Washington.

Dear Buck:

Subject: Franc Investment Co.

We are holding the $11,000 note here for safe-

keeping for your account, and as some little protection to your overdraft, although we are not banking on it too much for that purpose, for we do not want an overdraft if it can be helped. [135]

We are looking to you to keep us using black ink instead of red.

Sincerely,

W. T. TRIPLETT,
Vice-President.

R.

January 20, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

In General.

I want to again impress upon you the necessity of keeping right on top of these borrowers and not letting them get away from you. We have had so much grief this year that we have come to realize that no dependence can be put in either the market or the predictions of the borrowers. They are all optimistic and seem to feel that as soon as spring opens up things will begin to move, while, as a matter of fact, there is nothing in sight to verify their predictions. Money is tighter than ever, is hard to get; people are not buying anything unless they have to, and that includes food stuff as well as clothing, and we do not look for any decided movement until prices stabilize somewhere, and the stabilization point has not yet been reached. Things may hang around a given point for a few

days, but everything is on the down grade and they will go a good deal lower before they come back to any kind of normal basis. Prices have been abnormally high, and they must go subnormally low before finally adjusting themselves.

You know how it is: Bill is going to pay you because Tom is going to pay him, and Henry is going to pay Tom, and Jim is going to pay Henry, and by and by Jim fails to sell his stuff and the string is broken and nobody gets his money. The only safe course for a banker to pursue is to get the collateral in his own hands, and use the pressure that is necessary to smoke them out.

I only wish we could look for higher prices; it would mean so much more money in the community for us, and you can bet your last bean that if we thought for a minute prices were going higher we would not advise anyone to sell, for we want all the money in circulation that can be put in circulation. It means bigger deposits for us and greater earnings. On the other hand, we are just as anxious that the farmers and growers sell their produce now instead of waiting until the price goes lower, because in the latter case our deposits slump accordingly.

Your account is overdrawn to-night $7,726.10, and the big Seattle check has not shown up yet. It looks like you will have to pass along a few more rediscounts.

Sincerely,

W. T. TRIPLETT,

Vice--president.

R.

1–20–21.

W. T. Triplett, Secretary.
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

Enclosed find for rediscount and credit the following notes:

John Lufe	400.00	Statement
W. Hasegawa		
H. Tateoka	775.00	" Hasegawa
J. L. Barney	3,000.00	
Ralph B. Williamson	300.00	Secured by U. S. Liberty bonds $400.00
Total	4,475.00	[136]

I will forward the $400.00 liberty bonds to-morrow as they need conversion anyway, and to-night are locked up.

The Luft note $400.00 might not come to requirements, but the old man is an honest fellow and besides himself has two boys working and in some way will manage to clean it up, and besides is in fair shape, owing little.

The Jap note is only 15 days; he has sold spuds and will pay in two weeks.

The Barney note is back once more. Ellis handled Barney while I was out. He voluntarily paid the $500.00 on it and told Ellis we could have it in full any time by a couple days notice. Barney is really in pretty good shape. Barney & Callahan operator strictly cash stores at Yakima, Pasco, Kennewick, Cle Ellum, Roslyn and others, altho in some places the stores are under other names. They are in easy shape, maintain balances at this bank of from $10,000.00 to $20,000.00 continuously.

Barney attends to buying from all and handles all cash. Of late their account has been down to $5,000.00 as they have been sending some funds East, but the turnover is good, the other towns remitting here. There is no doubt that he can draw the money from the store accounts and that he is good for it, and would be entitled to it, as they always have more money in the bank than this note, altho I admit it should be gotten down to a definite commitment as to payment, which we haven't got. If worse came to worse, there is no question but what you could collect this note on the outside.

Yours very truly,
(Signed) W. F. BUCHHOLTZ.

P. S.—I have endorsed these myself as Ellis isn't here to-night.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Re: Rediscounts.

Your account has been credited with $4,411.42 to cover the proceeds of the rediscounts sent in your letter of January 20.

They look better than the average run of notes, and we believe you will be able to work them out. We are not concerned much about Barney, as he seems to have plenty of assets and to be a mighty good customer.

Sincerely,
W. T. TRIPLETT,
R. Vice-President.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Re: Collateral.

As requested, we are using the notes of B. L. Chaney $1,000 and S. L. Allen $1,934.20 as collateral to your loans in place of the Wapato Construction note $2,500.

We could be arrested for what we think of the Allen note. While on paper it sounds good, his statement shows a net worth of such a small amount as compared to what he owes that he seems hopelessly lost in the shuffle. However, for the reason that it has to be done, we are making the substitution for you. Mr. Allen may be able to pay out of his 1921 crop, but all of you fellows who are connected with the Central Bank & Trust Company had better [137] get down on your knees and start to praying that everything will run along right, or I fear you will never get the money.

As a matter of fact, I can't for the life of me see how that loan ever got in the bank. Somebody must have used a gun one dark night when there was nobody else around.

Sincerely,

W. T. TRIPLETT,
Vice-President.

R.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Re: Rediscounts.

Your account has been credited with $10,622.15 to cover the proceeds of the rediscounts sent in your letter of January 19. You have been charged $4,752.48 to retire the note of Jerome Lewis, renewal of which was enclosed to you.

Congratulations on getting the Wapato Construction loan in such good shape. You handled it just right. The only thing left to do is to see that the money they get comes to you to pay off their notes.

As to Jerome Lewis—it is one of those things that may take a long time to work out. Under ordinary circumstances we would not be favorable to making such a loan because things are too uncertain, but for the good of your bank the Executive Committee passed it through.

Sincerely,

W. T. TRIPLETT,
Vice-President.

R.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Re: Loewe Theater.

Glad to hear you have this account in better

shape. We talked it over somewhat with Mr. Barghoorn when he was here the other day, and both Mr. Rutter and I are of the opinion that it is not an account which you might ever expect to get much out of.

It is one of those things you have to watch like a hawk, and we believe he should be able to finance his own operations without calling on you for advances at the end of each week.

Sincerely,

W. T. TRIPLETT,

R. Vice-President.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

In regard to the Associated Fruit Company drafts—we are charging your account to-day as follows: [138]

October	14	$1,277.50
„	„	1,277.50
„	„	1,596.00
„	„	1,240.00
November	20	1,134.00

These have been entered for collection and will be credited to your account when and as paid, but I think you had better get after them and see if you cannot get the money.

There are two other drafts which have been out a good while, and I wish you would see the makers and try to get action at an early date. We refer to

William Joseph, Pittsburg, December 9. $2,060.20 received by us.

I. Cohen & Sons, December 16. $1,000.00 received by us.

Sincerely,

W. T. TRIPLETT,

R. Vice-President.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

Enclosed is a memorandum showing a credit for $493.25 to cover the Linse and Frisque notes. 'Nuf sed.

It will be agreeable to us to renew the Barney note when you get a new statement and all the trimmings.

Sincerely,

R. W. T. TRIPLETT,

Enc. Vice-President.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

It will be agreeable to us to exchange $10,000 worth of Liberty Bonds with the County Treasurer, and we are sending you under separate cover by insured, registered mail, the bonds shown on the enclosed memorandum.

Before turning these over we will ask that you not only send us the bank's receipt for the other bonds, but also the receipt which the Federal Reserve Bank sent you in connection with the conversion. We would not want to take the bank's receipt alone, as we would be in the same position as the treasurer, which you will admit is bad business.

We are depending on you to keep track of it, and see that when the bonds come back from the bank they are personally sent to us.

Sincerely,

W. T. TRIPLETT,

R. Vice-President.

January 21, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

As I told you yesterday over the telephone, we are well pleased with your [139] letter about the conversation you had with Mr. Ellis in regard to the Wapato Construction Company notes. There is no use in mincing words with that fellow. He either has not the backbone to follow a safe banking practice, or there is something wrong with his noodle. It seems to me that his experience in the last two months should be enough to teach him to go slow, but from our judgment of the man the only thing that can cause him to change his course is a bump right square in the face for himself, and not the bank.

You handled the matter right, and particularly as regards the policy of his directors. Those accounts brought in by Miller and Champ are nearly all dead weight, and there is no use in mincing words with them. The kind of business you should support now is that of non-borrowers who wil have crops and whose deposits can be used to liquidate indebtedness.

Sincerely,

W. T. TRIPLETT,

R. Vice-President.

1–21–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

Collateral.

Enclosed are the B. L. Blood note $400.00 and H. Z. Honda $3000.00 which you returned for endorsement of this bank.

I have taken out the Conrad Weiss note of $1480 odd out of the collateral due to condition of borrower and am substituting the following in its place.

H. Z. Honda	1100.00	due	4–17–21
A. J. Withers	250.00	„	3–23–21

This makes all of Honda's notes up as collateral or $4100.00. This may not look good to you but it is secured by tangible assets consisting of hotel furnishings in two hotels, lease paid on one for 3 years in advance. Furnishings valued at $10,000.00

insured for $8000.00. This is large but when things pick up, the Jap hotels make quick money.

Statement enclosed on Withers. We will get something on that soon.

Yours very truly,

W. F. BUCHHOLTZ.

Enc. 4 (Signed) W. F. BUCHHOLTZ.

1–21–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

Enclosed are original notes as follows:

A. A. McDermid	$1200.00
L. W. Adams	100.00

renewals of rediscounts the same for $1300 and $175.00.

New statement and history on McDermid enclosed.

L. W. Adams cut off $75.00 which he saved up. He hasn't gotten his apple money as yet. You have late statement. He is a clean cut young fellow and hunts up some work when he is idle. States he will clean up his two notes as they stand now by maturity. [140]

On the McDermid statement, I don't like the looks of the payment on his residence, but he assures me will clean up here out of hay and we will watch him.

Also kindly charge our account with $200.00 and endorse on the Baldoser rediscount. He left his check for interest and $200.00 on principal when

I was out. I want to get new statement before renewing and expect to get hold of him to-morrow.

Kindly advise details of entrees and oblige,

Yours very truly,

W. F. BUCHHOLTZ,

(Signed) W. F. BUCHHOLTZ.

P. S.—That makes $375.00 cash collected on your rediscounts today—going some, don't you think?

January 21,1921.

Mr. W. T. Triplett, Sec'y.,
Spokane & Eastern Trust Co.,
Spokane, Washington.

Dear Sir:

Enclosed find the following U. S. Liberty Bonds:

Rate	No.	Kind	Amt.
4¼	9104835	Fourth Loan	$100.00
„	9104828	„	100.00
„	9104829	„	100.00
„	9104827	„	100.00

aggregating $400.00 to be held as collateral to the Ralph B. Williamson note of $300.00. We have no hypo on this, as the bonds were taken out of a bunch of miscellaneous collateral held by this bank to cover any loans made Williamson.

Kindly have your collateral department attend to the conversion of the bonds.

Very truly yours,

W. F. BUCHHOLTZ,

B/H (Signed) W. F. BUCHHOLTZ.

1–21–21.

R. L. Rutter, President,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Rutter:

To give you an idea as to how quickly and unexpectedly a hay farmer can go broke in an irrigated country and secondly my idea as to the importance of complete and thoro statements, the necessity for following up with a second statement after the crop is grown, instead of a statement showing crop estimates—all from the standpoint of the rediscounting bank or the Federal Reserve Bank—I enclose statements as of June 2, 1920 and Jan. 1, 1921 of one Conrad Weiss, a borrower of the Central Bank & Trust Co.

In this instance, first the statement of June 1, 1920 was not complete. The borrower was not questioned closely enough, and the important error was the fact that the bank did not find out that the borrower was growing the hay on some 300 odd acres of Indian lands leased at the rate of $8 per acre, the least constituting a first lien on the crop, and against the crop of $6250 there should have been current debt of $2400 as rent to be paid. [141] Weiss is a Russian, speaks very poor English and he couldn't understand me very well, and I tried German on him, which tickled him to death and I found that I could get his lingo better than he could my English and we got along fine, and I think I have his affairs down very closely. You will note I have his 375 tons of hay down at $10.

Even this is high as it is not baled as yet and a long haul. Weiss says he does not figure on more than $8.00. The Indian who owns the land is a half breed Chinese who gets drunk every few days and goes after Weiss with a long knife until he has him scared to death, so Weiss gave the Toppenish bank and the Case Tractor people chattel mortgages on the hay subject to prior lien of the Indian agent on the lease, and is now staying away from the reservation entirely, telling the Indian agent and the Toppenish bank to sell the hay for him and if there was anything over to send it to us.

Part of the $1500 was borrowed for expense on the hay ranch; and had he been able to get $18 and $20.00 he could have cleaned up his entire current debts, including the $1000.00 land payment. The holder of the land contract has made him no promise to carry the payment over. Even if he does, next fall he will have $2000 to pay on the contract. He has given up the hay farming business and this year will farm only the 25 acres which he is living on. There is only one hope and that is the possibility of getting, say, a $5000 or $6000 mortgage on his place. He is going to put in some sugar beets and other truck, and his two boys are going to work for wages all summer to help get out of debt, and that these boys had agreed to stay with him until he had everything paid off again. He won't need any further credit as they can get by with their milk checks and eggs, having plenty of feed for cows and chickens.

I took a chattel mortgage on horses, cows, hogs, machinery, and all crops to be grown on the 25 acres which is subject to prior mortgage on horses and part of cows to the bank at Toppenish, but he will of course have to meet two payments on his place of $1000 each unless he can get extensions or arrange for a mortgage.

In 1919 this man sold over $5000 worth of hay, paid all he owed and had money left in the bank. It is true that the hay association at Toppenish is selling hay at $14 and $16, but Weiss doesn't belong to the association and they won't handle it for him, baling expense of $3.50, hauling and waste. He will do well to realize $7.00 net which knocks off over $1000 from amount listed.

This shows you how some of these fellows get hit and the necessity of keeping in close touch with borrowers and not taking too much for granted. The June statement looks good and I venture the Federal Reserve wuld have taken the note. A year like this should teach both some bankers and borrowers a few lessons which they should not forget immediately after they have one good year of crops and markets.

There were enough vegetables and fruit rotted in the fields in the Yakima valley to feed thousands and thousands of starving people, and it will appear that the government should have taken action to a least save a part of it when it wouldn't pay harvesting expense. Instead of that, solicitors came around to these very people and asked for cash contributions to aid the starving in Europe.

Weiss says he would have been better off financially if he hadn't harvested his hay at all. Can you beat that?

Sincerely yours,
(Signed) BUCHHOLTZ. [142]

1–21–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

In one of your letters of the 20th you touch the subject of apply collections on collateral notes on bills payable.

The idea is all right and from the viewpoint of ordinary rules and regulations, customs, etc., pertaining to business methods, it can only be the proper thing to do.

Mr. Rutter has written to me that we can expect no increase in deposits with perhaps a spurt upwards now and then, and that the only way of liquidating the indebtedness of this bank is to collect on loans. At present practically all of the paper which I have nerve enough to send for rediscount is there with exception of a small amount in the process of collection or renewal and some miscellaneous small stuff on which we haven't the statements and information up on.

I have talked with other Yakima bankers. They are bearing a heavy burden also, but they are all more or less confident of a good washing out of stuff during the next 90 days, mostly thru apples,

hops, potatoes, and some miscellaneous stuff, few having much confidence in hay. This theory is our only possible chance to liquidate our borrowed money down to a reasonable amount and maintain a cash reserve. Should we have a raise in deposits, even tho it might last only 30 or 60 days, it would naturally help our reserve, altho I admit it would be nothing to depend on and liquidation must naturally continue with the same pressure as before. During the process, which at present is very, very slow, I hope to gradually work down our rediscounts as collected and in this way. If anything substantial is accomplished, the best grade of paper will steadily disappear with the money going out, resulting in no betterment on our reserve condition. Needless to say, reserves must be kept up and the only possible way for the present at least, is that if collections are made on notes hypothecated, to keep the money here and give you something else. Of course the collateral will in this way become more and more of an undesirable nature, but I will keep it in as good shape as it is possible to do, keeping in mind that none of this should be of any question as to collection out of 1921 crops, and I am hog-tying everything of that nature by chattel mortgages on equipment and 1921 crops where there is anything tangible to get a hold of. Under separate cover, I am sending Mr. Rutter a $1500 note of Conrad Weiss, renewal of item held as collateral, and the story that goes with it. This item may appear very bad, but if the proper attention is given it next fall and markets amount to anything at all,

it can be cleaned up at that time, even if we have to close him out and allow his ranch to go back by default, hoping in the meantime that better days are coming and that it won't be necessary to be so harsh.

There is only one way that I know of to raise more cash, and that is by arranging the liberty bond loan in Seattle as we have done with you, giving Herb some real estate contracts and mortgages as collateral if he will take it; this is practically the last breath, and inasmuch as our deposits for the last ten days or so have held their own quite well at about $440,000 to $455,000, I have lived in hopes that we could get by without this last effort and avenue of relief.

In view of these conditions, if it can be worked out, it will be worked out, and I know that you have to stretch your imagination and use a high powered microscope in looking at the favorable points to the situation; in fact compare this institution to a man at the point of death but with a hopeful doctor on the case who is able to detect a slight heart action, and altho the patient was rapidly failing two weeks ago, the doctor's report is that for the past two weeks now have indicated nothing worse developing, with a possible gain in strength scarcely discernible, and speaking to the patient's wife and children, you would say that he had good chances for complete recovery. [143] In concluding, unless you insist, we will continue to hold what few pennies we might collect on your collateral notes

and substitute other stuff, which I hope you will O. K. for the present.

Sincerely yours,
W. F. BUCHHOLTZ.
(Signed) W. F. BUCHHOLTZ.

January 22, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

The rediscount notes of McDermid and Adams came this morning, and we have put them through our books. Your account has been credited $1,285.-31 to cover the new notes, and charged $1,673.13 to retire the old ones.

I don't like Mr. McDermid's statement very much, and I think you had better keep your eye on him to see that he does not divert his funds when he sells his hay. This is one of those cases where the first fellow who gets to the customer gets the money.

Sincerely,
W. T. TRIPLETT,
Vice-president.

R.
Enc.

1–23–21.

R. L. Rutter, President,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Rutter:

Enclosed is list of loans which I think can be col-

lected in full during next 90 days aggregating $147,-941. This of course does not include partial reductions on those which cannot be collected in full. There is considerable of that class. I have gone over it somewhat and a conservative estimate of cash collection possible out of that I think can be placed at $50,000. I am not taking Ellis's ideas closely and on such paper as I have had no opportunity to check up with the borrower. I have taken considerable salt with his estimates. Where he figures cleanups on some, I have in some cases figured as low as 50%, playing hunches and what information I have picked up and can read between the lines on old statements, discounting heavily where hay is depended on largely and the margins are not closely known.

This will be part of my report and I will appreciate it if you will have the sheets filed so that when I get it all there, they can be fastened together to make it complete. I am pushing along on the report at Mr. Triplett's suggestion and have a good start, but as it is a Sabbath night my conscience tells me that 11:30 is late enough and I know I should have gone to church and prayed for strength and good luck, but I have an alibi which I believe justifies my working tonight. Doesn't the gospel teach us that if it is possible to do some good for your fellowmen on a Sunday, to do it? I believe if I can be of some service in saving a part of the depositors here from loss of their hard earned cash, especially the widows and orphans, I should be per-

fectly justified in working to-night instead of attending church.

I am beginning to make a little speed on the little Corona which I have in my room, but as I am a touch operator it is awkward to change back to the Hunt & Peck system; besides the two shifts for capitals and figures bother me and that accounts for the poor work, but I trust you can make it out, and I am improving rapidly, as well as gaining speed.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ. [144]

January 24, 1921.

Mr. W. F. Buchholtz,
Central Bank & Trust Company,
Yakima, Washington.

Dear Buck:

The patient's friends and family are glad to hear that he is better; that he is no worse, and that he shows good prospects for improvement in the near future. This is extremely gratifying, but in the last analysis it means that the doctor must stay on the job night and day so as to be prepared for any relapse which may come, and to change the medicine if that is desirable. You know the old story about "A stitch in time saves nine." I don't know whether I learned that out of the back of an old spelling book or dictionary, or whatever it was, but nevertheless, it holds as true to-day as ever.

Your method of handling the collateral notes, while satisfactory from your standpoint, is not so

satisfactory to us, for the reason that our collateral will keep getting more and more shoddy as time goes on. We are willing and ready to stand back of the institution to a reasonable extent, but feel in so doing we should have a class of paper which will prevent any loss on our part. Many of the notes we have taken on are not up to our regular standard, and it was only because of your judgment after investigating at close range that we were willing to take them. Naturally, we do not want to take any more uncertain paper if it can be helped.

Our Executive Committee feels that you should immediately get in touch with Herb, and if possible arrange for him to purchase the Liberty Bonds from you, with the understanding that you will repurchase them within a reasonable time; also that he will permit you to put up notes and mortgages at the rate of one and one half to one behind the $30,000 he is now carrying for you. This will give you $30,000 additional money and should enable you to go on without any further assistance from us.

You will appreciate that we are already carrying a very heavy load for the bank, and that Herb ought to be willing to do that much for you. I think he will if you go at him in the right way, and remember, every nickel you shift over there means just that much to us. In case, however, he will not do that, get him to purchase the Liberty Bonds and send us your note for $30,000 collateral by one and one half to one of "good but slow" paper. What I mean by that, is paper which although it will ulti-

mately be paid cannot be liquidated from so-called quick assets.

It is one thing for us to get behind the bank and another thing for us to take a loss on it. Deposits are bound to slump, but we do not want to be in a position of having to pay them off at a sacrifice to our stockholders.

I mention these things so you will understand that while our feeling is the most friendly in the world and we are willing to do everything we can as long as the stuff is reasonably good, we do not want to get into the position where we will ultimately lose anything.

It seems to us with deposits slipping the way they are, and with the prospects ahead none too good, the deal for the sale of the bank should be hurried along as fast as possible, so that our mutual friend, Mr. Barghoorn will get out without greater loss than he will now sustain. In other words, I would rather take the prospective purchasers up on their own proposition than to hold for a higher price. If conditions go on much longer as they are now the institution will soon be in a place where no one will purchase, and then it is a case of either closing its doors or getting someone to see it through.

Sincerely,

W. T. TRIPLETT,

Vice-president.

Buck:

Our people aren't satisfied with the small notes. They think he is broke. Better dig around in the

old walnut sack and see if you can't substitute something else. [145]

January 24, 1921.

Mr. W. F. Buchholtz,
c/o Central Bank & Trust Co.,
Yakima, Washington.

Dear Buck:

This will acknowledge receipt of the collateral notes of H. Z. Honda for $1100.00 and A. J. Withers for $250.00 in replacement of the note of Conrad Weiss for $1486.39, sent you for collection.

We also received the two notes of B. L. Blood for $400.00 and H. Z. Honda for $3000.00 sent you for endorsement.

Yours truly,
W. T. TRIPLETT,
Vice-president.

B.

1–23–21.

R. L. Rutter, President,
Spokane & Eastern Trust Co.,
Spokane, Wn.

Dear Mr. Rutter:

The last three days, I have felt very discouraged with the way things have been going. As already advised, I have not expected to make a great showing in reducing rediscounts during January; in fact, I have felt that if we were able to keep up sufficient reserve to keep from overdrawing in Spokane, Iwould be pleased. I had hoped that after the liberty bond arrangement was made, giving us

$20,000.00 more working cash, plus some $60,000 more in rediscounts credited that we would be able to maintain a balance to our credit.

On Jan. 5th when I arrived here, we had about a $50,000.00 overdraft with some $8000.00 in fruit drafts gone hay-wire not charged back, making a total shortage of about $60,000.00 at that time. In addition to covering this, our deposits dropt from $482,000.00 to $430,000.00 Friday night, which is rock bottom to date. You will see at a glance how far the above $80,000.00 new money went.

During the 17 days that I have been here we have collected in cash a total of $15,259.08 and the enclosed adding machine slip will indicate that about $10,000.00 of this consisted of small items and that very little large amounts have come in and I don't expect anything large for ten days more; but to get down to my subject of reserves: The large items when they do come in will of course go on rediscounts with no improvement in our reserve. It is reasonable to expect that our deposits will remain above $400,000.00; in fact, we have hopes that they will hold up pretty well to where they are. The past week the shrinkage has not been bad and all of a regular nature, but to face possibilities square in the face, say we drop to $400,000.00 during the next two weeks, with collections on stuff in our pouch here to perhaps $10,000 it will hit our reserve to the extent of $20,000.00 more. This is a conservative view and we of course hope it will not be that bad. As we stand at this time, if all items are in the counting the $6500 in apple drafts charged

back the 21st, we will have an actual overdraft of about $15,000, and I cannot figure out more than $5000 of notes in our pouch here that can be expected to possibly pass muster for rediscounting unless I run on to something as I take new statements—some borrowers we have no statements whatever. [146]

There can be no sudden large drop in deposits other than a possible actual run on the bank which we have seen no signs of for ten days or more.

I have as yet, nothing completed in the shape of figures as what can be expected in liquidation during the next 90 days, which depends of course on the market on apples, hops, potatoes, and hay, in proportion and importance as per order named, we being fortunate not to have a great lot of hay loans where the margin is short. As written heretofore, business men and bankers here are confident of a good movement during February and March, tapering off in April. If there is not, I might add that there are many other institutions besides this one which will not be able to stand the test.

Altho I have not totaled up exact figures on loans based on each commodity and the probable liquidation thereof, if deposits keep up to where they are or nearly so, enabling us to keep up a reserve, I feel justified in making the statement that I am still confident of cutting down our borrowed money to a nominal amount if not entirely during the next 90 days.

Now I know very well that you don't want an overdraft, especially not running up into large

amounts, and needless to say, I am making every effort to better that condition, and as stated am nearly at the end of the rope unless one or two things can be done.

If Mr. Barghoorn can arrange to carry our liberty bond loan in Seattle, we might possibly arrange with the bank there to carry a note of $10,000 secured by slow but eventually good stuff, in the shape of real estate contracts and mortgages. This is one possibility which would help. The second is for the S. & E. to rediscount the Franc Inv. Co. note of $11,000.00 and the Johnson Drainage note of $5000.00 to be endorsed by Mr. Barghoorn. If neither of these arrangements are possible, there is only one more avenue of relief, and that is to whip up some of the stuff you are holding as collateral into rediscounts and substitute a poorer class of security.

Otherwise before we can collect enough to get ahead on reserve, the overdraft will be there and it will run up to $10,000 and $15,000 no doubt, perhaps more if deposits drop, and more drafts for fruit are charged back. In fact, it sifts itself down to whether you desire by all means to keep this institution open by all possible means, depending more or less on Mr. Barghoorn's personal credit, or whether you have set a limit as to how far you will go. Should the expected liquidation during the next 90 days fall far short, and it is necessary for you to carry, say $50,000.00 more of more or less paper of slow nature, which will reach an enormous sum by that time, I might add that I believe

the possibilities of the institution for future business and earning power to charge off bad paper is here. A bank is needed in this location and a good volume of business is assured, and with close and proper management, there is no doubt in my mind but what the indebtedness carried by the Spokane & Eastern Trust Co. can eventually be worked out and kept within reasonable bounds and worked into a valuable account.

The problems and work to keep up reserves is not at all an easy matter. The suspense is awful, waiting for something to move and bring in cash. It is by far the most stupendous task you have ever seen fit to put me to. I appreciate your confidence and am not weakening, but if you could write me a letter stating whether or not you will back the institution and myself any further in case of necessity it will greatly strengthen my morale, and I will benefit by knowing what to expect, and my very best efforts are pledged to you to get the situation worked out.

Yesterday, we mailed a $51,000.00 draft on you to the Seattle National Bank covering a large letter of items on other local banks, the net of which has been remitted to you and no doubt we will have a few dollars there to meet it. The draft will likely reach you Tuesday or Wednesday and if you pay it the overdraft created will be the limit to date of credit advanced this institution. Have Mr. Triplett ascertain the amount of the overdraft created [147]

if this draft is paid. If you do not pay it we are gone.

Sincerely yours,
W. F. BUCHHOLTZ.
(Signed) W. F. BUCHHOLTZ.

P. S.—I might add that by keeping the institution open and if necessary advance further requirements which could hardly total over $50,000.00 more in any event, that it will in my positive opinion result in a much shorter time for the Spokane & Eastern Trust Co. to get their money back then to close it up. We still have hopes of a sale to bolster the situation up, but I am not depending on that.

1–24–21.

W. T. Triplett, Secretary,
Spokane & Eastern Trust Co.,
Spokane, Wash.

Dear Mr. Triplett:

General.

Looks pretty nice to get a slip showing a $39,000 balance for Saturday, but wow, you wait till that big draft hits you to-morrow or Wednesday, which, together with the drafts charged back, will mean an overdraft of probably $15,000 again.

I have written Mr. Rutter a letter in regard to the situation, and to be frank I cannot figure out any chance of keeping the balance in our favor outside of the methods outlined therein. I have about $2500 in new stuff for rediscount in shape, but the notes are locked up and will forward the stuff to you to-morrow. I can send you some other

low grade stuff, if it would suit you better than an overdraft for the present.

Wish you would write me frankly on how the S. & E. feels about things here and whether we can expect you to honor our drafts if the overdrafts should go up to $25,000.00 or a little more, say for ten days or so and see if something doesn't develop by then.

Things don't look entirely hopeless on the apple situation. Smith showed me a telegraphic order for four cars at $2.50 to him, which is 40¢ over last week's prices, and he says inquiries are coming in thick to all the dealers, and that they all look for good business during February. Hay is being shipt every day now at $16.00, that is A1 stuff and altho the volume isn't so great, it shows that something is doing.

Perhaps I am taking things too seriously, but I had hoped that that large bunch of rediscounts and the liberty bond arrangement would keep our overdraft covered, but that bunch of E. S. Small drafts during the past few weeks aggregating about $8,000 or $10,000 has put an awful crimp into us, together with the slow regular shrinkage in deposits has run us out of funds. Some money is coming in on notes but it doesn't amount to anything in the way of helping the situation, and unless things improve this week I don't know what we are going to do, unless the S. & E. will carry the institution thru.

To-day it didn't get any worse. We collected about $1,700.00—$1,000 of which went on your re-

discounts, with a drop in deposits of only $1500. I wish I could make things as easily as some people I know, and perhaps I should feel more at ease about it, depending more or less on the strength of your letters and Mr. Rutter's that you would back me up. You have taken on everything I have sent for rediscount it is true, but I haven't the nerve to send you any junk for that purpose and the overdraft keeps wearing and the paralytic circumstances here ride on me. The suspense is awful. [148]

I am going to bed a little early to-night. Sunday morning after I had breakfast and went to my room, I felt as tho I hadn't had sleep enough and thought I would flop on the bed for a short rest. I dropt off to sleep with my clothes on and no covers and didn't wake up for three hours. As a result I took a cold in my head. It isn't so bad tho and won't bother me much to-morrow. I have been very busy again to-day going over things with borrowers altho I didn't get much money. I had to renew that Arslan paper and I have a complete statement of their actual condition. The last statement I sent is all wrong. That fellow don't understand English and to-day I got hold of the older brother who is quite well educated and I have it lined up. We won't get anything on that until April, likely $2000.00 then and a cleanup in July, not out of hop sales but out of advances on new contract for 1921 crop. We have this covered by an assignment of amounts called for in contract now. The contract calls for $17,000.00 to be ad-

vanced in April, July and September, and I think we are safe on it now. The total is $5000.00.

I keep running on to little stuff where fellows paid somebody else and have nothing left of their crops. You are right when you say you have to grab the money when they sell something. Cash is a pretty scarce article around here and when a farmer gets a little of it, somebody soon separates him from it. A $1,000 which I had figured on slipt away in a peculiar manner. Clyde Lee who owes that amount was in here a short time ago and agreed to sell enuf cattle to clean us up and I had confidence in him that he would do it. He had some cattle near Toppenish feeding them some cheap hay and drove them off alone to some unknown person in that section and apparently sold them. Saturday the 15th he phoned his wife that he would be home the following Sunday. That night he wrote her a letter in a Toppenish hotel to the effect that he had collected $300.00 cash on the cattle and would get the balance in February and they would then have enough to pay all their debts including the bank which he mentioned in the letter. Lee has never been seen or heard of since. He registered at that hotel but the bed indicated that he had not used it. The postmaster states that the letter was mailed between 6 and 8 that Saturday night. A piece of a kind of car case with his identification in the face was found in a freight shed at Toppenish on Monday. That is the only clue and it seems he has been snatched off of the earth as searching parties

have given up hopes. Old man Davis who has known Clyde Lee for 13 years says there is absolutely no chance of him beating it with the money and leaving his family and that it is no question but a case of foul play. Lee has $6,000 insurance but his statement doesn't indicate what companies. Don't know if any Western Union or not. Mr. Rutter might have this checked up. Haven't seen Ross about it yet. It is likely that he was knocked in the head for the $300 he had on him and his body dumped into some canyon. Believe me, the times are beginning to show up on the unemployed and Toppenish and Yakima have some tough nuts hanging around. To-night as I was on my way to the bank, crossing the tracks where it is not very light, a big rough looking fellow stopt me and said in a gruff tone "Give me a half a dollar to get something to eat." There weren't any people near and it was kind of dark and as he didn't ask for a very large sum, I quietly handed him the four bits which he grabbed and walked off. I thot that was the healthiest and most economical way out and as he talked in such a firm, determined tone, I didn't go into details with him either nor argue the question with him. Something told me to close the transaction quickly and make a get away without trying to Jew him down any or discourage the idea for in the meantime, if no people showed up, he might begin to think that 50¢ wasn't enough and might invite me to step in the dark behind the warehouse and enter into negotiations for more. There is a gang of them here. Sunday night they

held a parade and street speeches. They are getting so bold that in one instance they pushed their way into a cheap rooming house one night and slept there in spite of the proprietor's efforts to the contrary.

Well, I must beat it to bed. I'm not much good for business to-night, but will be feeling better in the morning I am sure. I look forward to your letters as the event of the day and any encouragement and assistance or suggestions help a lot right at this time. You see I don't know [149] just how far you can go on S. B. and since he has resigned from the board, it must put it down to a clean cut proposition.

Sincerely yours,
(Signed) W. F. BUCHHOLTZ.

January 25, 1921.

W. T. Triplett, Vice-Pres.,
Spokane & Eastern Trust Co.

Dear Sir:

With reference to the draft on William Joseph, Pittsburgh, $2,060.20, received by you on December 9th:

This is one of E. S. Small's drafts and as Small is out of the city for a few days, I am unable to get in touch with him, to run it down.

I am, however, wiring William Joseph today asking reasons for non-payment and will let you know of any results as soon as I hear from him.

Very truly yours,
W. F. BUCHHOLTZ,
(Signed) W. F. BUCHHOLTZ.

B/H [150]

After the close of all the evidence and after the case had been argued, the following stipulation was entered into between the attorneys for the Spokane & Eastern Trust Company, for the Central Bank & Trust Company, and for the plaintiff, to wit:

In this cause the Court having ruled that defendant, Spokane & Eastern Trust Company is entitled in the decree to have provision made for the return to it of all promissory notes and choses in action, being the rediscounts and securities charged-back against the Central Bank and Trust Company by the Spokane & Eastern Trust Company by the close of business on the 25th day of January, 1921, a list of which is hereto attached, the defendant Central Bank and Trust Company and E. L. Farnsworth, as Director of Taxation and Examination of the State of Washington, contest the right of defendant Spokane & Eastern Trust Company to such a provision in the decree. However, as the court has so ruled and as it will be necessary to take some details of evidence to identify these several items, either before the Court or before the Master, and the defendant E. L. Farnsworth, as Director of Taxation and Examination of the State of Washington, and Central Bank and Trust Company object to the taking of any further evidence in that behalf, but the Court having ruled it may be taken, now without waiving the objections above expressed, or any of them, or any other objection

which might be taken to the said defendants the Central Bank and Trust Company and the said E. L. Farnsworth, in said respects, or any of them, but solely for the purpose of saving the time and labor of making the formal proof, IT IS STIPULATED that such further evidence, if taken, would show the following to be a correct list of said promissory notes and choses in action so charged-back: [151]

MAKER	PAYEE	AMOUNT	DATE
Brown, C. O.	Central Bank & Trust Co.	$4,600.00	Oct. 25, 1920
Interest to Jan. 25, 1921		.90	
Paddock, H.	"	1,500.00	Dec. 20, 1920
Interest to Jan. 25, 1921	"	1.75	
McDermid, A. A. & McDermid, R. C.	"	500.00	Dec. 20, 1920
Interest to Jan. 25, 1921		.58	
Baldozer, A. E.	"	1,100.00	Dec. 20, 1920
Interest to Jan. 25, 1921		1.22	
Kimura, J.	"	3,000.00	Dec. 23, 1920
Interest to Jan. 25, 1921		1.75	
Sunset Fruit & Produce Co.	"	4,000.00	Dec. 23, 1920
Interest to Jan. 25, 1921		2.33	
Small, E. S.	"	5,500.00	Dec. 23, 1920
Interest to Jan. 25, 1921		3.21	
K. T. Produce Co.	"	3,000.00	Nov. 18, 1920
Interest to Jan. 25, 1921		4.67	
Campbell, M. B.	"	2,200.00	Dec. 17, 1920
Interest to Jan. 25, 1921		3.42	

Dated this 24th day of July, 1922.

GRAVES, KIZER & GRAVES,
Attorneys for Spokane & Eastern Trust Company.

R. J. VENABLES and
H. B. RIGG of Counsel,
Attorneys for Central Bank & Trust Company.

PETERS & POWELL,
Attorneys for United States Steel Products Company. [152]

Certificate of Judge to Statement of Evidence.

I, F. H. Rudkin, Judge of the above-entitled court, and the Judge before whom this cause was tried, find the foregoing statement and abstract of evidence to be a true and complete statement of the evidence given upon the trial of the cause, and that it is properly prepared; and I hereby approve it as a statement of the evidence to be filed in this cause and used on appeal herein.

The Clerk is directed to file such statement in this cause and make it a part of the record herein for the purposes of appeal.

Dated 5th January, 1923.

FRANK H. RUDKIN,
Judge. [153]

[Endorsed]: Number 881. Statement of Evidence on Appeal. Filed in the U. S. District Court Eastern Dist. of Washington. Jan. 6, 1923. Alan G. Paine, Clerk. Edw. E. Cleaver, Deputy. [154]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

UNITED STATES STEEL PRODUCTS COMPANY,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY, CENTRAL BANK AND TRUST COMPANY, and E. L. FARNSWORTH, as director of Taxation and Examination of the State of Washington,

Defendants.

Petition for Appeal.

The petition of the Spokane & Eastern Trust Company, a defendant herein, respectfully represents:

The defendant Spokane & Eastern Trust Company is aggrieved by the judgment and decree rendered herein signed 25th July, 1922, and filed 27th July, 1922, wherein and whereby judgment was given in favor of the plaintiff and against the defendant Spokane & Eastern Trust Company in the sum of forty-four thousand nine hundred forty-three and 84/100 ($44,943.84) dollars, together with interest thereon at the rate of six per cent per annum from 24th January, 1921, and for the costs of the action, and by all other relief awarded in said judgment and decree in favor of plaintiff and

against this defendant, and for the reasons specified in the assignment of errors filed herewith the defendant Spokane & Eastern Trust Company desires to appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit.

Said defendant presents herewith and makes a part of this application an assignment of errors in this cause and tenders a bond in such amount as the Court may require for the purposes of the appeal, and prays that the petition may be allowed and that a transcript of the entire records, proceedings, testimony and papers upon which the said decree was made, duly authenticated, shall be sent to the Circuit Court of Appeals for the Ninth Circuit in the manner and form and at the [155] time prescribed by law and by the rules of said Circuit Court of Appeals.

Said defendant prays for all orders necessary in the premises and for general relief.

F. H. GRAVES,
W. G. GRAVES,
B. H. KIZER,
Solicitors for Defendant Spokane & Eastern Trust Company.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Filed Jan. 6, 1923. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy. [156]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

UNITED STATES STEEL PRODUCTS COMPANY,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY, CENTRAL BANK AND TRUST COMPANY, and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,

Defendants.

Assignment of Errors.

The defendant Spokane & Eastern Trust Company, being desirous of appealing to the Circuit Court of Appeals for the Ninth Circuit from the final decree rendered in this cause, bearing date 25th July, 1922, and filed 27th July, 1922, submits the following assignment of errors which it asserts and intends to urge on such appeal.

The District Court erred:

I. In holding that the allegations of the complaint were supported by the proof save with respect to the particular manner in which the check of the Yakima Hardware Company was paid.

II. In holding that the transactions between the Central Bank & Trust Company and Spokane & Eastern Trust Company were contrary to sound law and good morals.

III. In holding that the relation of trustee and *cestui que trust* subsisted between the Central Bank & Trust Company and plaintiff with respect to the proceeds of the check of the Yakima Hardware Company which the Central Bank collected for plaintiff.

IV. In holding that the relation of trustee and *cestui que trust* subsisted between the Spokane & Eastern Trust Company and plaintiff.

V. In holding that the proceeds of the check aforesaid was traceable as a trust fund in the hands of either the Central Bank & Trust Company or the Spokane & Eastern Trust Company. [157]

VI. In refusing to dismiss the action as against the Spokane & Eastern Trust Company for want of equity.

VII. In rendering a decree for any relief or in any amount in plaintiff's favor and against defendant Spokane & Eastern Trust Company.

VIII. Finally, if it be held that plaintiff was entitled to any relief against the defendant Spokane & Eastern Trust Company, then the District Court erred in not reducing the amount of the recovery by the amount of the drafts drawn upon the Spokane & Eastern Trust Company by the Central Bank & Trust Company and paid by the former prior to the time it was informed of the draft for $51,188.04 drawn upon it by the Central Bank & Trust Company in favor of the Seattle National Bank and of the circumstances surrounding the drawing of such draft.

WHEREFORE, the defendant Spokane & Eastern Trust Company prays that the said decree be reversed and that the District Court be directed to dismiss the action as to such defendant.

F. H. GRAVES,
W. G. GRAVES,
B. H. KIZER,

Solicitors for Defendant Spokane & Eastern Trust Company.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Filed Jan. 6, 1923. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy. [158]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

UNITED STATES STEEL PRODUCTS COMPANY,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY, CENTRAL BANK AND TRUST COMPANY, and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,

Defendants.

Order Allowing Appeal.

Upon consideration of the petition and an assign-

ment of errors presented therewith, it is ordered that an appeal be allowed to the defendant Spokane & Eastern Trust Company from the decree rendered in this cause dated 25th July, 1922, and filed 27th July, 1922, wherein and whereby judgment was rendered against the said defendant in favor of plaintiff in the sum of forty-four thousand nine hundred forty-three and 84/100 ($44,943.84) dollars, and for other relief, and that the appeal shall be returnable to the United States Circuit Court of Appeals for the Ninth Circuit upon the execution of a bond in the penal sum of one thousand ($1,000) dollars.

It appearing that the defendants Central Bank & Trust Company and E. L. Farnsworth, as director of taxation and examination of the State of Washington, have in writing stated that they would not join the defendant Spokane & Eastern Trust Company in its appeal herein and that they waived their right to so join,—

IT IS ORDERED that the defendant Spokane & Eastern Trust Company may prosecute its appeal independently of its codefendants and that they need not be joined as appellants with it for the purposes of this appeal. [159]

And it is still further ordered that a transcript of the record, in accordance with the provisions of law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, shall be authenticated and transmitted to the Court of Appeals as prayed.

Dated 5th January, 1923.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Filed Jan. 6, 1923. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy. [160]

In the District Court of the United States for the Eastern District of Washingon, Southern Division.

IN EQUITY.

UNITED STATES STEEL PRODUCTS COMPANY,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPAY, CENTRAL BANK AND TRUST COMPANY, and E. L. FARNSWORTH, As Director of Taxation and Examination of the State of Washington,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, the Spokane & Eastern Trust Company, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound

unto the United States Steel Products Company in the sum of One Thousand Dollars, to be paid to the said United States Steel Products Company, its successors or assigns, to which payment well and truly to be made we bind ourselves and our successors, jointly and severally by these presents.

Sealed with our seals and dated this 5th day of January, in the year of our Lord one thousand nine hundred and twenty-three.

WHEREAS, at a term of the District Court of the United States for the Eastern District of Washington in the Southern Division thereof, in a suit depending in said court between the United States Steel Products Company, plaintiff, and the Spokane & Eastern Trust Company and others, defendants, a decree was rendered in favor of plaintiff and against the defendant Spokane & Eastern Trust Company; and

WHEREAS, the defendant Spokane & Eastern Trust Company has sued out an appeal to reverse such decree and has prayed the allowance of the appeal and citation directed to the United States Steel Products Company to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit; [161]

NOW, the condition of the above obligation is such that if the aforesaid Spokane & Eastern Trust Company shall prosecute its appeal to effect and answer all costs if it fail to make its plea good, then the above obligation shall be void; otherwise it shall

remain in full force and virtue.

SPOKANE & EASTERN TRUST COMPANY,

[Seal] By CONNER MALOTT,

Its Vice-President.

B. M. CAMPBELL,

Secty.

FIDELITY & DEPOSIT CO. OF MARYLAND,

By S. M. SMITH,

Attorney-in-Fact.

[Seal] Attest: W. S. McCREA,

General Agent.

The foregoing bond is approved for the purposes of the appeal herein, 5th January, 1923.

FRANK H. RUDKIN,

Judge.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Filed Jan. 6, 1923. Alan G. Paine, Clerk. By Edwd. E. Cleaver, Deputy. [162]

[Endorsed]: No. 3983. United States Circuit Court of Appeals for the Ninth Circuit. Spokane & Eastern Trust Company, a Corporation, Appellant, vs. United States Steel Products Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District

Court for the Eastern District of Washington, Southern Division.

Filed February 3, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Circuit Court of Appeals for the Ninth Circuit.

SPOKANE & EASTERN TRUST COMPANY,
Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY,
Appellee,

and

CENTRAL BANK & TRUST COMPANY and E. L. FARNSWORTH, as Director, etc.,
Defendants.

Statement of Errors for Purpose of Printing Record.

The appellant will rely upon the following errors in presenting its appeal herein, to wit:

The District Court erred:

1. In holding that the transactions between the Central Bank & Trust Company and the Spokane

& Eastern Trust Company were contrary to sound law and good morals.

2. In holding that the relation of trustee and *cestui que trust* subsisted between the Central Bank & Trust Company and the United States Steel Products Company with respect to the proceeds of the check of the Yakima Hardware Company which the Central Bank collected for the United States Steel Products Company.

3. In holding that the relation of trustee and *cestui que trust* subsisted between the Spokane & Eastern Trust Company and the United States Steel Products Company.

4. In holding that the proceeds of the check aforesaid were traceable as a trust fund in the hands of either the Central Bank & Trust Company or the Spokane & Eastern Trust Company.

5. In refusing to dismiss the action against the Spokane & Eastern Trust Company for want of equity.

6. In rendering a decree for any relief or in any amount in favor of the United States Steel Products Company and against the Spokane & Eastern Trust Company.

7. If it be held that United States Steel Products Company was entitled to any relief against the Spokane & Eastern Trust Company, then there was error in not reducing the amount of the recovery by the amount of the drafts drawn upon Spokane & Eastern Trust Company by the Central Bank & Trust Company and paid by the former prior to the time it was informed of the draft for $51,188.04

drawn upon it by the Central Bank & Trust Company in favor of the Seattle National Bank and of the circumstances surrounding the drawing of such draft.

F. H. GRAVES,
W. G. GRAVES,
B. H. KIZER,
Solicitors for Spokane & Eastern Trust Company.

[Endorsed]: No. 3983. In the Circuit Court of Appeals, for the Ninth Circuit. Spokane & Eastern Trust Company, Appellant, vs. United States Steel Products Company, Appellee. Statement of Errors for Purpose of Printing Record. Filed Jan. 25, 1923. F. D. Monckton, Clerk. Re-filed Feb. 3, 1923. F. D. Monckton, Clerk.

Service of the within Statement of Errors accepted this 17th day of January, 1923.

PETERS & POWELL,
Attorneys for Appellee.

In the Circuit Court of Appeals for the Ninth Circuit

SPOKANE & EASTERN TRUST COMPANY,
Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY,
Appellee,

and

CENTRAL BANK & TRUST COMPANY and E. L. FARNSWORTH as Director, etc.,
Defendants.

Designation of Parts of Record to be Printed.

The appellant designates for printing the following portions of the record which it thinks necessary for the consideration of the errors on which it intends to rely on appeal, as shown by the statement of errors heretofore filed herein, to wit:

Complaint.

Answer of defendant Spokane & Eastern Trust Company.

Answer of defendants Central Bank & Trust Company and E. L. Farnsworth as Director of Taxation and Examination of the State of Washington.

Memorandum opinion of Judge Rudkin ordering the entry of a decree in the plaintiff's favor.

Stipulation entered into between the attorneys for all the parties dated 24th July, 1922, relative to certain promissory notes and choses in action which had been charged back by the Spokane & Eastern Trust Company to the Central Bank & Trust Company and returned to the latter company.

Decree.

Stipulation for the signing and certifying of the statement of evidence.

Statement of evidence.

Petition for appeal.

Assignment of errors.

Order allowing appeal and fixing bond.
Bond on appeal.

F. H. GRAVES,
W. G. GRAVES,
B. H. KIZER,
Solicitors for Spokane & Eastern Trust Company.

[Endorsed]: No. 3983. In the Circuit Court of Appeals, for the Ninth Circuit. Spokane & Eastern Trust Company, Appellant, vs. United States Steel Products Company, Appellee, and Central Bank & Trust Company and E. L. Farnsworth as director, etc., Defendants. Designation of Parts of the Record to be Printed. Filed Jan. 25, 1923. F. D. Monckton, Clerk. Re-filed Feb. 3, 1923. F. D. Monckton, Clerk.

Service of the within Statement of Errors accepted this 17th day of January, 1923.

PETERS & POWELL,
Attorneys for Appellee.

IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SPOKANE & EASTERN TRUST COMPANY,
Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY,
Appellee,

and

CENTRAL BANK & TRUST COMPANY and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,
Defendants.

No. 3983

Appeal from District Court, Eastern District of Washington

APPELLANT'S OPENING BRIEF

F. H. GRAVES
W. G. GRAVES
B. H. KIZER,
Spokane, Washington
Solicitors for Appellant.

EMPIRE-PACIFIC PRINTING CO., SPOKANE

FILED

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SPOKANE & EASTERN TRUST COMPANY, *Appellant,* vs. UNITED STATES STEEL PRODUCTS COMPANY, *Appellee,* and CENTRAL BANK & TRUST COMPANY and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington, *Defendants.*	No. 3983

Appeal from District Court, Eastern District of Washington

APPELLANT'S OPENING BRIEF

F. H. GRAVES
W. G. GRAVES
B. H. KIZER,
Spokane, Washington
Solicitors for Appellant.

STATEMENT OF THE CASE

The United States Steel Products Company, the appellee, was plaintiff below and will herein be called the plaintiff. Appellant, the Spokane & Eastern Trust Company, will be called the Trust Company, and its co-defendant, the Central Bank & Trust Company, will be called the Central Bank or the Bank. Where amounts are referred to they will be stated in round figures unless it may chance that the exact sum is material.

By its complaint plaintiff sought to charge the Trust Company as trustee of $47,000, the proceeds of a collection made for plaintiff by the Central Bank. Broadly stated, these are the facts involved: At the time of the transaction upon which plaintiff bases its action, the Central Bank, which is now insolvent, was a banking house at Yakima, Washington. It was rather a small bank, having a capital of but $50,000, with deposits of approximately $500,000. It was not a member of the Federal Reserve System. For several years the Trust Company, whose banking house is at Spokane, had been a correspondent of the Central Bank, the latter having an active account with it. When the deflation period began in 1920, the deposits of the Central Bank began to shrink, and it was necessary for it to obtain money from time to time from outside sources. Its principal shareholder and president was one Sikko Barghoorn, a resident of Spokane, who was a man of considerable means, con-

trolling at least one other country bank, the Colville Loan & Trust Co., and since 1908 a director of the Trust Company. As the Central Bank began to feel the pinch of deflation, Barghoorn applied to the Trust Company for financial assistance. The Trust Company loaned the Central Bank $20,000 on its note, secured by collateral, rediscounted a goodly amount of paper for it, and permitted it to overdraw from time to time; the latter, however, only in an emergency and in anticipation of a prompt covering. It may be remarked in passing that the extending of such assistance was a common occurrence during the deflation period, not only with the Trust Company but with all the large banks who were members of the Federal Reserve System. As they needed assistance the Federal Reserve extended it to them, and they in turn extended like assistance as needed to the smaller banks that were not members of the Federal Reserve System. Had it not been for this co-operation, this aid extended by the stronger to the weaker, there would have been a financial panic in 1921 which would have far surpassed that of 1893.

The Central Bank had several correspondents with which it carried active accounts; depositing cash items, borrowing money or rediscounting paper, and drawing upon the balances thus created. Its principal correspondent, however, was the Trust Company, especially during the last of 1920 and the beginning of 1921. During that period there was not a banking day passed that it did not deposit considearble sums with the Trust Company, either by the transmission

of checks, drafts and other cash items, or by the rediscounting of paper, and that it did not draw drafts in considerable amounts upon the Trust Company. It appears, indeed, that while the Central Bank had several correspondents, more than half of all the drafts it drew in settlement of its obligations were drawn upon the Trust Company.

On the 18th January, 1921, the Yakima Hardware Company remitted $47,000 to plaintiff's Seattle office by means of a check for that amount drawn upon the Yakima Trust Company. Plaintiff deposited the check with the Seattle National Bank, and that bank sent the check, together with other checks and cash items, the total amount of which exceeded $51,000, to the Central Bank for collection. The Central Bank was not a member of the Yakima clearing house association, but cleared through the Yakima Valley Bank, with which it carried a balance for clearing purposes. It received the items from the Seattle National Bank on the 21st January, and put them with other items it had for collection through the clearing house on that day, the total amount exceeding $58,000. All these items were collected, but by reason of checks drawn upon the Central Bank and presented through the clearing house on that day, the total amount received by the Yakima Valley Bank for credit to the Central Bank was but $49,000. The Yakima Valley Bank then gave the Central Bank two drafts; one for $45,000 drawn on the Bank of California at Tacoma, and the other for $3,000 drawn upon the Fidelity National Bank of Spokane. The balance, $1,500, the

Central Bank left on deposit with the Yakima Valley Bank. The Central Bank sent the two drafts, together with other cash items, the total of which was $48,500, to the Trust Company for credit to its account. At the same time it sent the Seattle National Bank a draft for $51,000, drawn upon the Trust Company, in settlement of the items the Seattle bank had sent it for collection. This draft was not presented to the Trust Company for payment until 26th January, but the Trust Company was informed on the 25th that such draft had been drawn on it. Prior drafts drawn upon it by the Central Bank had by then come in and been paid, whereby the balance of the Central Bank had been reduced to $24,000. To pay the draft it would be necessary to allow the Central Bank an overdraft of $27,000. Moreover, a number of rediscounted notes, which were secured by the guaranty or endorsement of the Central Bank, were overdue, and under the arrangement between the two banks the Trust Company had the right to charge these back to the Central Bank. After a survey of the situation and a consultation with Barghoorn, the Trust Company decided that it would not pay the draft when it was presented, and so advised him. He immediately went to Yakima to endeavor to secure assistance from the local banks, but as it was found that the Central Bank would need about $100,000 to tide it over its difficulties, he was unable to secure it. The Central Bank closed its doors on the 27th January, and the Seattle National Bank, which had refused to assume responsibility for the collection of out-of-town

items, charged the $47,000 check back to plaintiff's account. Plaintiff then brought this suit against the Trust Company, the Central Bank, and E. L. Farnsworth, the head of the State Banking Department, and as such in charge of the liquidation of the Central Bank. The theory of the suit was that the Central Bank received and collected the $47,000 check as trustee for plaintiff; that in dereliction of its duty the Central Bank sent the proceeds of the collection to the Trust Company instead of transmitting them to plaintiff; and that the Trust Company received the money with knowledge that it was a trust fund, and belonged to plaintiff. The District Court held that plaintiff was entitled to recover the amount of the check, less certain deductions, from the Trust Company, and rendered judgment accordingly. The Trust Company has brought the case here by appeal from that judgment.

SPECIFICATION OF ERRORS

There was error:

I. In holding that the allegations of the complaint were supported by the proof save with respect to the particular manner in which the check of the Yakima Hardware Company was paid.

II. In holding that the transactions between the Central Bank & Trust Company and Spokane & Eastern Trust Company were contrary to sound law and good morals.

II. In holding that the relation of trustee and

cestui que trust subsisted between the Central Bank & Trust Company and plaintiff with respect to the proceeds of the check of the Yakima Hardware Company which the Central Bank collected for plaintiff.

IV. In holding that the relation of trustee and *cestui que trust* subsisted between the Spokane & Eastern Trust Company and plaintiff.

V. In holding that the proceeds of the check aforesaid were traceable as a trust fund in the hands of either the Central Bank & Trust Company or the Spokane & Eastern Trust Company.

VI. In refusing to dismiss the action as against the Spokane & Eastern Trust Company for want of equity.

VII. In rendering a decree for any relief or in any amount in plaintiff's favor and against defendant Spokane & Eastern Trust Company.

VIII. Finally, if it be held that plaintiff was entitled to any relief against the defendant Spokane & Eastern Trust Company, then the District Court erred in not reducing the amount of the recovery by the amount of the drafts drawn upon the Spokane & Eastern Trust Company by the Central Bank & Trust Company and paid by the former prior to the time it was informed of the draft for $51,000 drawn upon it by the Central Bank & Trust Company in favor of the Seattle National Bank, and of the circumstances surrounding the drawing of such draft.

ARGUMENT

I. *The Trust Company was guilty of neither legal nor moral wrong in its relations with the Central Bank. On the contrary, it was generous to the point where generosity came in conflict with sound banking methods.*

Upon reading the above headnote, it will no doubt occur to the Court that the question whether the Trust Company dealt fairly or unfairly, generously or sordidly, with the Central Bank, can have no proper bearing upon the decision of the case. We think it has none, but it was made the basis of the decree appealed from, and so it seems desirable to deal with it before taking up the questions which are really decisive of the case.

When the Central Bank collected plaintiff's check, it intermingled the money collected with its general funds and used it in paying its general debts, a part being applied upon its debt to the Trust Company. In so doing it acted in accordance with the custom of banks and its implied contract with plaintiff. Plaintiff has no cause for complaint, and cannot recover in this action, unless it appears that because of its insolvency the Central Bank was guilty of fraud in making the collection in the usual manner, and that because thereof plaintiff may rescind its contract with the Bank, whereby it became plaintiff's debtor for the amount of the collection, and hold the Bank as trustee *ex maleficio* of the money. Necessarily, therefore,

the decisive questions in the case are whether the Central Bank was guilty of a fraud upon plaintiff, whether because of such fraud it may be held as a trustee *ex maleficio,* and whether the trust fund it received was traced into the possession of the Trust Company. Apparently those decisive questions were lost sight of and not considered by the District Judge. The rationale of his decision seems to be found in these words:

> "Much was said on the argument about the banking laws of the state, the decisions of our Supreme Court, the commingling of funds, and the relations ordinarily existing between different banks in transactions of this kind. But inasmuch as the case will doubtless go to a higher court, I will not discuss these different questions at length. Suffice it to say that after giving full consideration to the arguments of counsel and the authorities cited I am firmly convinced that under the circumstances disclosed by this record one bank should not be permitted to nurse another along in this way until it finds a favorable opportunity to seize the money of some innocent third party to square its accounts, and then abandon its nursling to the tender mercies of bank examiners and receivers. Such a course is forbidden alike by sound law and good morals."
> (Trans., 21.)

Now, the questions of whether the Central Bank perpetrated a fraud upon plaintiff, and whether because of such fraud plaintiff could rescind the contract by which the Bank became plaintiff's debtor, and hold the Bank as trustee instead, are questions of mixed law and fact. Neither the law nor the facts material to those questions were considered. The law

of the case was relegated to a higher court for decision. The facts were no further remarked on than to say that the conduct of the Trust Company in nursing the Bank along for a time and then abandoning it was contrary to sound law and good morals. What relevancy the assumed fact had to the question of whether the Central Bank was guilty of a fraud upon plaintiff is not discoverable. Quite obviously, the decision went off upon a false issue, and in consequence the issues which must be decided if the case is to be correctly decided were overlooked. However, the judgment appealed from rests upon that false foundation, and so we have thought it best to demonstrate the fairness and good faith of the Trust Company in its dealings with the Bank before taking up the decisive questions.

If one may judge from the slighting remark relative to the Trust Company nursing the Central Bank along, the District Judge was under the impression that in extending assistance to the Central Bank under the circumstances here present the Trust Company did an unusual thing, and that its action was induced by some sinister motive. Such notions are pure figments. The evidence is conclusive that the assistance was necessitated by and was given during the deflation period that followed the war inflation; that the larger and stronger banks all over the country, or at least in the extreme northwest, were required to and were extending such assistance to their weaker brethren during that period; that such action was induced by no improper motive, but by a desire to save the

credit of the country; and that the assistance which the Trust Company gave the Central Bank differed not a whit from the aid it gave other banks similarly circumstanced, save that it was, perhaps, more generous. Stevens, a State bank examiner who testified for plaintiff, said that the deflation period in Washington, Idaho and Montana began in the fall of 1920, and was at its peak about the time the Central Bank closed its doors; that it caused prices to drop, money to become scarce, and bank deposits to fall off; that all banks, except those possessing liquid securities, were forced to look to outside sources for assistance; that banks that were members of the Federal Reserve System got assistance there, while the smaller banks looked to the larger banks for aid; that during this period the Trust Company was extending liberal assistance to a large number of banks throughout the Spokane territory; that the extending of such assistance was not only done with the approval of the State banking department, but that under some circumstances it was done at the solicitation of the department; and that the department knew the Trust Company was extending assistance to the Central Bank. He did not recall the amount of loans and rediscounts to and for other banks made by the Trust Company, but knew it ran into a very large sum; perhaps one-third of its total loans. (Trans., 60-61.)

Triplett, a vice president of the Trust Company, testified that during the deflation period it was extending financial assistance in various ways to from 75 to 100 banks, located in Washington, Idaho and Mont-

ana. At the peak the amount it had out in that way was over $3,500,000. The great majority of the banks it assisted weathered the storm, but the Central Bank and some six or seven others did not; notwithstanding the assistance given them they were obliged to close their doors. (Trans., 105-107.) Speaking of the effect of the deflation upon bank deposits, the witness said that at the first of January, 1920, the deposits of the Trust Company were over $15,000,000, while at the first of January, 1921, they were about $11,000,000, and during the month went down to $9,500,000. At the first of January, 1920, country banks had on deposit with the Trust Company over $6,000,000; in the fall of that year their deposits had shrunk to less than $2,000,000. (Trans., 105.) It should be remarked that in November, 1920, the deposits of the Central Bank amounted to $665,000, on the 3rd of January to $513,000, and on the 25th to $426,000. (Trans., 83-84.) Whether deposits were reckoned in millions or hundreds of thousands, the deflation period appeared to have a uniform proportionate effect on them.

The foregoing testimony was not disputed nor in any way questioned, and it proves that the action of the Trust Company in assisting the Central Bank was not only usual during the financial crisis through which the country was passing, but was meritorious, and was approved of, if not solicited, by the State banking department, the department authorized by the laws of the State to approve of that which is sound and honest and condemn that which is unsound and

dishonest in banking methods.

But the District Court thought that the Trust Company abandoned its "nursling" as soon as it found "a favorable opportunity to seize the money of some innocent third party to square its accounts," and it is upon that supposed offense, evidently, that the decree is based. There are two very sound objections to a decree based upon such a theory. The first is that under the pleadings and evidence plaintiff cannot recover unless it has shown that the Central Bank was a trustee for plaintiff, and that a trust fund belonging to plaintiff was turned over by the Bank to the Trust Company. However unkindly the Trust Company may have treated its "nursling," that fact has no bearing on those questions. The second is that the assumed facts are pure fancies. There was neither abandonment of the "nursling" nor seizure of any third party's money. What occurred was that the Trust Company refused to permit the Central Bank to overdraw its account some $27,000, believing such an overdraft under the circumstances to be contrary to sound banking. There was no abandonment, for, as we shall point out later, the Trust Company was willing to continue its assistance under conditions that would insure it against loss. It was justified, both legally and morally, in refusing to take chances in its operations. The country was passing through a critical period financially, and it behooved every bank to adhere strictly to sound banking methods. The Trust Company was assisting from 75 to 100 banks, any one of which had as good a claim upon it as any other.

Its outlay for that purpose was over $3,500,000. In a year's time it had lost $6,000,000 in deposits. On account of those two things alone, then, it had been required to pay out $9,500,000 in money. In addition the banking laws of the State required it to maintain a cash reserve of 15% of its total deposits, and, necessarily, it had to keep itself in such a condition that it could supply the pecuniary needs of its local customers. Its primary obligation, of course, was to its own depositors, and it could justify no action that might, by any possibility, imperil its solvency. Unquestionably it could have advanced the additional $100,000 or more which might have been needed to carry the Central Bank through, and its solvency would not have been impaired although the whole amount had been lost. But no more morally than legally could it be expected to do so. The aggregate of all the demands upon it must be considered in determining how far it ought, in good conscience, to have gone in assisting the Central Bank, and what risks of loss it ought to have taken. The Bank had no better claim upon it than any other country bank, or local customer, who looked to it for assistance from time to time, and it could not properly extend assistance to the Bank which it would not, under similar circumstances, have extended to them. The Bank already owed it $185,000 to $190,000 on direct obligations or guaranties or endorsements of rediscounted paper. A goodly amount of the rediscounted paper was overdue, and under the arrangement between the two banks it could have been charged back to the Bank.

This had not been done because, toward the last, the Trust Company saw no prospect of getting anything better in its stead. The Trust Company was strongly opposed to overdrafts, but nevertheless the account of the Bank was overdrawn, in fluctuating amounts, during the greater part of January. The Bank was slow, especially toward the latter part of the month, in covering the overdrafts, and some of the paper it sent on for that purpose did not appear to be desirable. When the Bank drew the $51,000 draft on the 21st, it made no preparation for covering the heavy overdraft which it knew would result if the draft were paid, nor did it take the precaution to ascertain beforehand whether the Trust Company would permit the overdraft. It was not until the 25th, one day before the draft was presented, that the Trust Company was informed of it. Even then no paper was sent on to cover the overdraft which would result if the draft were paid, nor were there any assurances or promises that it would be promptly covered. On the contrary, the letter which advised the Trust Company of the draft suggested that it might be called upon to advance $50,000 more on paper of a slow nature, and possibly to permit the substitution of "a poorer class of security" for that which it already held. (Trans., 230.) It was because of those conditions that the Trust Company declined to allow the overdraft. (Trans., 113-114.) Adhering to sound banking methods it could not do otherwise. It was willing to continue its assistance to the Central Bank, but only upon condition that it should not be exposed to

loss in doing so. The drawing of the $51,000 draft upon it was, in effect, an attempt to exact a forced loan upon the Bank's own terms. Permission was not sought to make the overdraft, no preparation was made for covering it, the Trust Company was not informed until the day before the draft was presented that such an overdraft was desired. It was placed in a situation where it was required to decide almost immediately whether it would pay the draft and trust to the good will and ability of the Bank to cover the overdraft that would be created, or would dishonor it. Morally as well as legally it was in the right in refusing to be hurried into a $27,000 loan of the safety of which it was not sure.

The District Judge rejected these very apparent reasons for refusing to permit the overdraft in favor of a secret, sordid motive; the opportunity thereby afforded the Trust Company to seize the $48,000 remittance. It is manifest that the evidence was forgotten or overlooked else such a conclusion would not have been reached. One whose purpose is the seizure of money without regard to others' rights may be depended on to make the seizure when the largest amount of money is obtainable. If the Trust Company can be considered to have seized the money in question, it could have got twice as much as it did by making the seizure two or three days earlier. The $48,000 remittance was received and credited to the account of the Bank on the 22nd. The credit extinguished an existing overdraft and gave the Bank a balance of $38,000. During the next two or three

days smaller remittances, and some notes for rediscount, the whole amounting to $5,000 or $10,000, were received and credited to the Bank. During the same period, however, a number of drafts, one for $17,000, drawn by the Bank upon the Trust Company, were presented and paid, so that on the 25th, when the Trust Company decided that it would not pay the draft, the Bank had a balance of but $24,000. (Trans., 111-112, 119.) If the Trust Company was animated solely by sordid motives, its purpose being to seize all the money it could, it is evident that as soon as the $48,000 was received it would have been applied upon the Bank's indebtedness, that the same use would have been made of the smaller remittances received during the next few days, and that no drafts would have been paid. Had that course been pursued the Trust Company would have obtained $40,000 to $50,000 instead of the $24,000 it did get. That it was not pursued is in itself sufficient to prove how wrong the District Court was in the conclusion it reached concerning the transaction.

There are other circumstances which equally relieve the Trust Company from the imputation of sordidness and prove it to have acted in entire good faith. Early in the transactions between the two banks, the Central Bank pledged $20,000 in Liberty Bonds to secure a note it gave the Trust Company. In the latter part of January, when the Bank began to have difficulty in keeping up its cash reserve, the Trust Company permitted the Bank to withdraw the bonds, sell them, and use the proceeds for building up its

reserve. In lieu of the bonds the Trust Company received slow notes as security, many of which were not paid at the time of the trial. (Trans., 107, 118, 136-138.) The exact date of the substitution was not fixed by the evidence, but it was evidently about the 21st. (Trans., 227-228.) It does not need remark that if seizing money was the governing motive of the Trust Company in its dealings with the Bank, it would never have relaxed its grip upon anything so like money as Liberty bonds.

The generous attitude of the Trust Company is exemplified by an incident which occurred just before the Central Bank closed its doors. Stevens, a State bank examiner, reached Yakima for the purpose of examining the Bank on the morning of the 26th. He knew of the outstanding draft for $51,000, and that the Trust Company would not pay it. When he looked at the Bank's balance sheet he saw steps would need be taken immediately to provide money to pay the draft, and he called the bankers of Yakima in conference upon the means for raising the money. They agreed to advance certain sums, enough to take care of the draft but not to permanently relieve the Bank's cash shortage. He then called up the Trust Company and the Bank's correspondent at Seattle to ask them to help. The Seattle bank promised to do something but would not commit itself to anything definite. The Trust Company agreed to advance $15,000. As the Yakima bankers went more thoroughly into the assets of the Bank, they concluded that more money would be needed to relieve its em-

barrassment, probably as much as $100,000, and the examiner called up the Trust Company again to ask it to increase the amount it would advance. It then agreed to advance $20,000. (Trans., 57-58.) Nothing came of this, for the Yakima bankers offers of assistance "petered out," as the examiner expressed it, and the Bank was obliged to close. But the good faith of the Trust Company's offer cannot be questioned and it permits no doubt that throughout its motives were of the best, and that it was willing to do all it safely could to keep the Bank going.

Furthermore, no reason is discoverable for the anxiety of the Trust Company to "square its accounts" which is imputed to it. It need never have permitted the Central Bank to get in its debt, and it was at liberty to refuse further advances whenever it thought the debt was growing too large or the security poor. Early in January the debt was but $142,000, for which, among other securities, it held $20,000 in Liberty bonds. At one time during the month the debt went as high as $212,000, and on the 25th, before the overdue rediscounted notes were charged back to the Bank, it amounted to $185,000 or $190,000. (Trans., 118, 136.) And although the debt was increasing, the Trust Company, for the accommodation of the Bank and to enable it to maintain its cash reserve, permitted the withdrawal of the Liberty bonds and took slow notes in their stead. When the Trust Company had all along been so liberal in its dealings with the Bank, permitting the debt to increase and the security to become impaired, it is unreasonable to assume that

it all at once became obsessed with a mad desire to "square accounts" with the Bank, and was willing to cause its failure in order to get $24,000 in money.

We think, however, that the most complete refutation of the view adopted by the District Judge is found in a number of letters which were introduced in evidence by plaintiff. These passed between Triplett, a vice president of the Trust Company who had charge of its transactions with country banks, and Buckholtz, an employe of the Central Bank. Of Buckholtz' connection with the Central Bank we shall have more to say under subsequent heads. It suffices for present purposes that he was a young man who had been an employe of the Trust Company for several years, and was highly esteemed by its officers. The State banking department disapproved of Ellis, the cashier of the Central Bank, who, by reason of the non-residence of Barghoorn, its president, was virtually its manager. Barghoorn had agreed to get a man to take Ellis' place, and asked the officers of the Trust Company to recommend some one for the position. They recommended Buckholtz, and Barghoorn employed him to go to Yakima, familarize himself with the Bank's operations, and, if he proved efficient, to succeed Ellis as soon as the change could be made without causing trouble. Buckholtz went to Yakima on the 6th January. No official position was given him, but he was put in charge of the credit department, the position he had occupied with the Trust Company. His principal duties were to restrict the making of new loans and enforce collection of old ones; mat-

ters in which Ellis was very lax. Along with these duties he was authorized to select from the paper of the Central Bank such as he thought would be eligible for rediscount with the Trust Company, get information concerning it which would enable the Trust Company to pass upon its eligibility, and forward it to the Trust Company as the Central Bank needed to raise money by rediscounting. While Triplett had been his superior in the Trust Company, and was evidently an older man, they were on very friendly and intimate terms, addressing each other generally as "Dear Trip" and "Dear Buck." The letters on both sides were very frank and aboveboard, it being apparent that the writers expressed themselves freely and without reserve upon the topics under discussion. The matters dealt with principally related to paper offered for rediscount and rediscounted paper that was falling due, but Buckholtz also wrote freely of conditions as he found them in Yakima and in the Central Bank. Prices were falling, farmers would not sell their produce or sold at a loss, and wanted the banks to carry them until conditions got better. Ellis was disposed to yield to such pressure, granted renewals readily and was lax in enforcing collections, and Buckholtz found it difficult to inject the desired stiffening into the credit operations of the Central Bank. To such letters the officers of the Trust Company, principally Triplett but once or twice Mr. Rutter, its president, replied quite fully, expressing their view of the financial situation generally, and the necessity for firmness in enforcing collections and restricting credit.

There are too many of these letters and they are of too great length to permit of reference to them separately. But speaking of them generally, they establish beyond question that while the writers felt that the Central Bank had been too lenient in extending credit and enforcing collections, nothing was needed but more firmness in such matters and some temporary assistance, such as the Trust Company was extending, to tide it over the deflation period. That the Trust Company intended to extend such assistance its officers' letters leave no doubt. In illustration, Buckohltz wrote Mr. Rutter on the 9th January that the withdrawals (of deposits) had ceased, and that if the (farm) products would sell at all at reasonable figures he was confident "that we can get by and liquidate our indebtedness within 90 days." Trans., 148.) Under date of the 10th Mr. Rutter replied, congratulating Buckholtz on the "strong position" he was taking, but cautioning him that banks were passing through a troubled period and firmness in making collections was essential. Of the attitude of the Trust Company it was said: "If your hypothesis is correct there is no question but what we will do our part." (Trans., 53.)

Under date of the 20th January Triplett wrote Buckholtz concerning a particular loan, advising stringent measures to make the borrower pay, and ending in this wise with respect to the general situation:

> "Messrs. Ellis and Barghoorn both seem to feel that if you put on the pressure too hard the borrowers will begin to talk about the bank, and to

some extent we feel they are right—but on the other hand, fear is about the worst thing in the world. It causes a man to neglect his business and to almost crawl into a hole and pull the hole in after him. The fellow who goes on about his business and does what is right, having the diplomacy of which we well know you are possessed, is bound to come out on top, and I have not the slightest idea but that you can pull things out along those lines."

(Trans., 202.)

On the same day Triplett also wrote him as follows:

"I want to again impress upon you the necessity of keeping right on top of these borrowers and not letting them get away from you. We have had so much grief this year that we have come to realize that no dependence can be put in either the market or the predictions of the borrowers. They are all optimistic and seem to feel that as soon as spring opens up things will begin to move, while, as a matter of fact, there is nothing in sight to verify their predictions. Money is tighter than ever, is hard to get; people are not buying anything unless they have to, and that includes food stuff as well as clothing, and we do not look for any decided movement until prices stabilize somewhere, and the stabilization point has not yet been reached. Things may hang around a given point for a few days, but everything is on the down grade and they will go a good deal lower before they come back to any kind of normal basis. Prices have been abnormally high, and they must go sub-normally low before finally adjusting themselves.

* * * * * * *

Your account is overdrawn tonight $7,726.10, and the big Seattle check has not shown up yet. It looks like you will have to pass along a few

more rediscounts."
(Trans., 204-205.)

The "big Seattle check" was the draft to the Seattle National Bank for $17,700 which was referred to in Buckholtz' letter of the 19th. (Trans., 198.)

On the 21st Triplett wrote in three different letters:

"Your account has been credited with $4,411.42 to cover the proceeds of the rediscounts sent in your letter of January 20.

They look better than the average run of notes, and we believe you will be able to work them out. We are not concerned much about Barney, as he seems to have plenty of assets and to be a mighty good customer."

* * * * * * *

"As requested, we are using the notes of B. L. Chaney $1,000 and S. L. Allen $1,934.20 as collateral to your loans in place of the Wapato Construction note $2,500.

* * * * * * *

We could be arrested for what we think of the Allen note. While on paper it sounds good, his statement shows a net worth of such a small amount as compared to what he owes that he seems hopelessly lost in the shuffle. However, for the reason that it has to be done, we are making the substitution for you. Mr. Allen may be able to pay out of his 1921 crop, but all of you fellows who are connected with the Central Bank & Trust Company had better get right down on your knees and start to praying that everything will run along right, or I fear you will never get the money."

* * * * * * *

"Your account has been credited with $10,622.16 to cover the proceeds of the rediscounts sent in your letter of January 19. You have been charged $4,752.48 to retire the note of

Jerome Lewis, renewal of which was enclosed to you.

* * * * * * *

As to Jerome Lewis—it is one of those things that may take a long time to work out. Under ordinary circumstances we would not be favorable to making such a loan because things are too uncertain, but for the good of your bank the Executive Committee passed it through."

(Trans., 207-209.)

Under date of the 21st Buckholtz wrote a long letter on general conditions in Yakima and in the Central Bank. The effect of it was that all the Yakima banks were carrying a heavy load, but that all were confident "of a good washing out of stuff during the next 90 days" through the sale of farm produce. In the meantime, Buckholtz said, it was going to be difficult for the Central Bank to keep up its cash reserve. He thought that to do so it would be necessary for the Bank to retain collections on hypothecated paper which it made, and to send the Trust Company other paper in lieu of the money. The effect of this, he recognized, would be that the Trust Company would get more and more undesirable paper; in other words, paper which would probably not be paid before the 1921 crops were marketed. The only other way he saw to keep up the Bank's cash reserve was to arrange "the Liberty bond loan in Seattle as we have done with you," *i. e.*, get "Herb" (Herbert Witherspoon, vice president of the National City Bank of Seattle, a bank which had been extending assistance to the Central Bank along the same lines as the Trust Company, albeit not so liberally (Trans., 89), to surrender

the Liberty bonds he held as collateral so they might be sold, and take real estate contracts and mortgages in lieu of them. He closed by saying that "unless you insist, we will continue to hold what few pennies we might collect on your collateral notes and substitute other stuff, which I hope you will O. K. for the present." (Trans., 219-222.)

To this Triplett, writing under date of the 24th (the day before the apocryphal seizure of plaintiff's money), demurred. He foresaw that this would result in the Trust Company's collateral getting "more and more shoddy as time goes on." He thought "Herb" ought to be willing to help the Central Bank out in the manner suggested, and requested Buckholtz to immediately get in touch with "Herb" and ascertain if the latter would not buy the Liberty bonds, which would give the Central Bank $30,000 in money, and accept notes and mortgages as security in their stead. There was, however, no flat refusal to comply with Buckholtz' request in the event that "Herb" proved obdurate. On the contrary, Triplett said that if "he will not do that, get him to purchase the Liberty bonds and send us your note for $30,000 collateralled by one and one-half to one of 'good but slow' paper. What I mean by that, is paper which although it will ultimately be paid cannot be liquidated from so-called quick assets." Expressing the feeling of the Trust Company with respect to continued assistance, it was said:

> "We are willing and ready to stand back of the institution to a reasonable extent, but feel in

so doing we should have a class of paper which will prevent any loss on our part. Many of the notes we have taken on are not up to our regular standard, and it was only because of your judgment after investigating at close range that we were willing to take them. Naturally, we do not want to take any more uncertain paper if it can be helped.

* * * * * * *

It is one thing for us to get behind the bank and another thing for us to take a loss on it. Deposits are bound to slump, but we do not want to be in a position of having to pay them off at a sacrifice to our stockholders.

I mention these things so you will understand that while our feeling is the most friendly in the world and we are willing to do everything we can as long as the stuff is reasonably good, we do not want to get into the position where we will ultimately lose anything."

(Trans. 224-226.)

This last letter was written two days after the receipt of the $48,000 remittance. It is evident that it, at least, was not read by the District Judge. The money which he thought the Trust Company was only waiting "a favorable opportunity to seize" was already in its hands. It did not desire to put any more money into "good but slow" paper; all banks were at that time too much loaded down with that commodity. It had already complained of the character of some of the paper the Central Bank offered for rediscount, although it was accepted in order to aid the Bank. And yet, with the $48,000 in its hands, it was not ready to "abandon its nursling to the tender mercies of bank examiners and receivers," but instead offered to take on an additional load of $30,000 if it was

necessary that it should do so, provided that it was furnished with collateral which was reasonably good, however slow. The generosity of the tone of this letter, and the sincere desire of the Trust Company to continue its assistance if it could be made reasonably safe in doing so, are unquestionable. Entertaining the high opinion that we do of the District Judge, we are forced to the conclusion that he read none of this correspondence; most certainly not this last letter.

Probably this letter will be made the text for questioning the sincerity of the reasons given by the Trust Company for refusing to permit the overdraft, and it will be asked why it was that if the Trust Company was willing on the 24th to make an additional loan of $30,000, it should have refused on the 25th to permit an overdraft of $27,000. Slight consideration furnishes several obvious answers to the question. The first is found in the provision of the State banking code that "Every transfer of its property or assets by any bank * * * made in contemplation of insolvency, or after it shall have become insolvent within the meaning of this act, with a view to the preference of one creditor over another, or to prevent the equal distribution of its property and assets among its creditors, shall be void." Session Laws 1917, pp. 298-99, Remington's Comp. Statutes 1922, §3262. In view of this statute, it is apparent that if the Central Bank was insolvent, and the Trust Company had reason to believe that it was so, yet permitted it to overdraw, afterward getting securities to cover the overdraft, such securities could be recovered by the liquid-

ator of the Bank if its doors were subsequently closed. Now on the morning of the 25th Mr. Rutter received a very pessimistic letter from Buckholtz relating to the Bank's affairs. It appeared from it that unless conditions changed for the better soon the Bank would be in serious difficulty. While Buckholtz spoke of several avenues by means of which the Bank might extricate itself from its difficulties, he said that if all these failed "it sifts itself down to whether you desire by all means to keep this institution open by all possible means, depending more or less on Mr. Barghoorn's personal credit, or whether you have set a limit as to how far you will go." He told of the $51,000 draft that had been sent the Seattle National Bank, said that if it was paid "the overdraft created will be the limit to date of credit advanced this institution," but that "if you do not pay it, we are gone." (Trans., 227-232.) Here, certainly, was food for thought, and the situation received thought. The executive committee met, Mr. Graves, the attorney for and one of the directors of the Trust Company, was called into consultation, and it was finally decided not to pay the draft. (Trans., 122.) Ascribing to Mr. Graves ordinary knowledge of the law and ordinary caution in dealing with situations where large sums were involved, it must be assumed that he advised the executive committee that the letter put the Trust Company upon inquiry concerning the solvency of the Central Bank; that if it was insolvent, and the Trust Company allowed the overdraft, afterward taking securities to cover it, the securities could be recovered

by the liquidator of the Bank if its doors were subsequently closed. The committee, confronted with the alternatives of refusing to allow the overdraft, keeping the Bank open at whatever cost, or losing the securities it received to cover the overdraft in the event of the Bank's failure, prudently chose the first.

Other equally obvious answers are these: There is a vast difference between permitting one to overdraw, trusting to his ability and good disposition to afterward give adequate security therefor, and making a loan upon security which must be submitted and approved beforehand. The Central Bank had been making overdrafts and subsequently covering them with unsatisfactory paper, and the Trust Company did not desire to experiment on so large a scale.

Under the arrangement proposed in the letter, the Central Bank would have got $30,000 in cash without increasing its indebtedness one dollar. It owed the National City Bank $30,000, the debt being secured by a pledge of $30,000 in Liberty bonds. The proposal was that the Trust Company would take over the National City Bank debt, accepting as security therefor "good but slow" paper, and thus release for sale the bonds which were pledged to the National City Bank. If the overdraft had been permitted the Central Bank would still have owed $30,000 to the National City Bank, and would have increased its indebtedness to the Trust Company by $27,000. The amount which a debtor owes affects his ability to pay, and the Trust Company might well be willing to take

on an additional burden of $30,000 if thereby a debt of that amount which the Central Bank owed to another creditor was paid, but be utterly unwilling to assume the added burden if it meant an increase of so much in the total indebtedness of the Bank.

It should be remarked that overdrafts have always been frowned on, by courts as well as by banks. It has been held that allowing an overdraft was a misapplication of a bank's funds, and that a cashier could not justify his allowance of an overdraft by the plea that it was authorized by the board of directors. *Minor vs. Mechanics' Bank,* 1 Pet. 46, 71. Though the practice of paying overdrafts has prevailed to some extent, it is one that should not be sanctioned, for "it has no authority in sound usage or in law." *Lancaster Bank vs. Woodward,* 18 Pa. St., 357. "The bank had no legal right to permit the drawer to overdraw and pay his check out of the funds of other depositors, or the money of the stockholders." *Culver vs. Marks* (Ind.), 23 N. E., 1086, 1089.

There was, manifestly, sound reason, not whim or improper motive, behind the distinction which the Trust Company made between making a loan, secured by collateral, to the Central Bank, and permitting the latter to overdraw.

Something will be attempted to be made, no doubt, of the fact that the account of the Central Bank was frequenly overdrawn during January, and that in some instances the overdraft apparently exceeded that which would have resulted had the $51,000 draft been paid.

The amounts of these overdrafts, as put in evidence by plaintiff, were taken from the books of the Central Bank, and do not prove that the Trust Company actually permitted an overdraft of the amount shown on the Bank's books. The books of the Trust Company and the Bank never corresponded with respect to their balances on a given day; there might be a discrepancy of $25,000 to $50,000 between them. If the Bank on, say, the 7th, drew drafts upon the Trust Company aggregating $50,000, an entry would be immediately made on the Bank's books debiting the Bank and crediting the Trust Company with their amount. If the Bank then had no balance with the Trust Company, the Bank's books would show a $50,000 overdraft. However, the drafts might not be presented for several days or a week or two, and before they were presented the Bank might have made remittances sufficient to cover them, so that in fact there would never have been any overdraft, albeit one was shown for a time on the books of the Bank. (Trans., 43.) An apt illustration appears from the books of the Bank during its last days. They showed from the 22nd to the 27th an overdraft running from $13,000 to $56,000. (Trans., 87.) The books of the Trust Company showed that for the same period the Bank had a balance running from a few hundred dollars to $38,000. (Trans., 111-112.)

But let that pass. With the exception of the overdrafts which were erroneously shown to have existed between the 22nd and 27th, the books of the Central Bank showed no large overdrafts except from the 3d

to the 7th. (Trans., 87.) At that time, however, the Bank's rediscounts amounted to only $115,000, while from the 22nd to the 24th its rediscounts amounted to $190,000. (Trans., 85.) Furthermore, the credit of the Bank was much better during the first part of the month than it was towards the last. The continued shrinkage in deposits, the difficulty it was experiencing in keeping up its cash reserve, and the unsatisfactory paper it was asking the Trust Company to accept for rediscount and to cover overdrafts, necessarily induced caution on the part of the Trust Company in the extension of credit. Obviously, conditions from the 3d to the 7th were so different from what they were from the 22nd to the 27th, that the allowance of an overdraft during the first period would be no criterion by which to determine whether it could prudently have been allowed during the second period.

The offer of the Trust Company, in response to the application made to it by the bank examiner on the 26th, to donate $15,000 to $20,000 to a fund to keep the Central Bank open, may be invoked to cast doubt upon the sincerity of the reasons given for refusing to allow the overdraft. It can have no such effect. While called a donation it would not, of course, have been that, for if the Bank had been rescued and restored to solvency, it would have been obligated to repay all the money advanced to it to effect that result. But had it been an out-and-out donation the Trust Company could well afford to have made it. It would have joined a number of other banks in making up a fund large enough to relieve the Bank from its

present embarrassment not only, but to recoup its losses and put it firmly on its feet, so it would need no further assistance. Had the Trust Company allowed the overdraft, the only effect would have been to relieve the present embarrassment of the Bank, still leaving to the Trust Company, unaided, the burden of carrying the Bank through the deflation period, or else bringing on the same crisis later by refusing assistance. Furthermore, the Bank owed the Trust Company on notes and guaranties of rediscounted paper $162,000; not counting the rediscounts charged back on the 25th, $185,000 to $190,000. (Trans., 136.) If the Bank's losses were recouped by means of the proposed fund, so that it was restored to solvency, the Trust Company would be sure of collecting the debt owing it, otherwise it would have to depend solely upon the solvency of the makers of the paper that it held. The Trust Company was not any too well informed concerning their solvency; indeed, by reference to the Triplett-Buckholtz correspondence it will be seen that it entertained considerable doubt of the solvency of some of them. If it could be made safe on the existing debt, and be relieved from further requests for assistance, it could have well afforded to give, unrestrictedly, $15,000 to $20,000.

Mayhap facetiousness will be indulged in because of the desire expressed in the letter to aid the Central Bank, coupled with the statement that in doing so the Trust Company did not intend to be put in a position where it would sustain a loss. A bank official who felt any other way, especially in a time of

financial distress, should be promptly removed for incompetence, if not dishonesty. He, more than any other, must put justice before generosity. The money he loans is not his but belongs to the depositors in his bank, with remainder over, if any there be, to its shareholders. In a year's time the Trust Company had lost $6,000,000 in deposits. That meant, of course, that it had to keep its cash reserve intact and collect $6,000,000 from its borrowers in order to pay off its withdrawing depositors. In addition it had loaned or otherwise supplied to smaller banks over $3,500,000 and must have had loans to its customers in a much larger amount, for the bank examiner estimated that its loans to banks were about one-third of its total loans. Its officers would have been insane if in every loan they made they had not proceeded on the principle that the bank should not be put in a position where it would sustain loss.

We are impelled to the conclusion that in this case the fine judicial balance of the District Judge failed him, and that he permitted suspicion to take the place of the preponderance of evidence that is needed to sustain his harsh decision. An almost parallel case is found in *Dunlap vs. Seattle National Bank*, 93 Wash., 568, 161 Pac., 364. A trustee in bankruptcy of an insolvent bank brought suit against one of its correspondent banks, alleging that the two banks had conspired to defraud by the correspondent bank advancing money to the insolvent to enable it to keep its doors open and obtain deposits, the deposits being then turned over to the correspondent bank and applied

upon the indebtedness of the insolvent bank to it; it being alleged that more than $200,000 was thus received by the correspondent bank. The only evidence to sustain these allegations was that the insolvent bank was hopelessly insolvent; that the condition of the insolvent bank had been a matter of concern to the correspondent, which knew that if it did not advance money from time to time to the latter it would be obliged to close its doors; that the correspondent did loan the insolvent large sums of money, whereby the latter was enabled to keep its doors open and receive deposits in considerable amounts, much of which was deposited with the correspondent and reduced the indebtedness of the insolvent to it; and that as soon as the correspondent declined to extend further assistance the insolvent was forced to close its doors. It was held that the evidence was insufficient to sustain the allegations of the complaint, the Court saying:

> "The plaintiff, in support of his charge, does not rely upon positive testimony, but upon circumstances, claiming that these establish the charge as made. Fraud cannot be inferred from facts and circumstances lawful in themselves and consistent with an honest purpose. If, when all the facts and circumstances are taken together, they are consistent with an honest intent, proof of fraud is wanting.
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> In *Foster vs. McAlester*, 114 Fed., 145, the circuit court for the eighth circuit, said:
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> 'Fraud cannot be inferred either by the court or jury from acts legal in themselves, and consistent with an honest purpose. The settled rule on this subject is that slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no cer-

> tain results, are not sufficient to establish fraud. They must not be, when taken together and aggregated—when interlinked and put in proper relation to each other—consistent with an honest intent. If they are, the proof of fraud is wanting'."

We would paint no halo around the Trust Company. Undoubtedly business, not sentiment, dominated its relations with the Central Bank. It assisted the Central Bank just as it did many other banks: for business reasons. It did not intend to throw its money away, and expected to continue its assistance only so long as it was reasonably safe in doing so. No one would expect a bank, especially during a financial crisis, to do otherwise. But we challenge plaintiff to indicate a shred of evidence tending to convict it of dishonesty or unfairness. No improper motive can be suggested for it beginning the task of aiding the Central Bank during the financial depression. Certainly no such motive influenced it to continue the task while the demands of the Bank increased and the security it had to offer became poorer in quality. The discontinuance of the assistance was as free from taint. Justice to its depositors, justice to its shareholders, justice to the many other small banks which were depending on it for assistance, forbade that the Trust Company should advance money to the Bank when the latter was disinclined or unable to give adequate security therefor. Had its refusal to allow the heavy overdraft which the Central Bank attempted to fasten on it been prompted by unfairness or sordidness, it would not, just a few days before, have per-

mitted the Bank to withdraw $20,000 in Liberty bonds and substitute inferior security therefor; it would not, the day before, have offered to take over the $30,000 debt to the Seattle bank if "good but slow" paper was given it as security, so that $30,000 in Liberty bonds might be released to the Bank for sale; and it would not, the day after, have offered to contribute $15,000 to $20,000 to a fund which should be sufficient to relieve the Bank from its embarrassment. Most assuredly if its refusal to pay the $51,000 draft was animated by its desire to get some money to apply on the Bank's indebtedness to it, the money would have been taken and applied when it came in, several days before, and not after it had been reduced by more than half by the payment of drafts drawn by the Bank. The evidence permits no other conclusion than that the Trust Company began and continued its assistance to the Central Bank for sound and legitimate business reasons, and that for the same reasons it refused to allow the heavy overdraft which payment of the $51,000 draft would have created. Any notion that the Trust Company nursed the Bank along and finally abandoned it for an improper purpose is the product of sheer, stark suspicion, and is conclusively refuted by the evidence.

II. *The relation between the Central Bank and plaintiff was that of debtor and creditor, and consequently the money which plaintiff seeks to recover was not a trust fund to which it is entitled.*

The Trust Company can only be held liable on the

theory that the Central Bank collected plaintiff's check and held its proceeds as trustee for plaintiff, and that the trust fund thus created was wrongfully turned over to the Trust Company. The evidence establishes that the Central Bank was not plaintiff's trustee for the proceeds of the collection but merely its debtor therefor. That being the case, the money which the Central Bank remitted to the Trust Company on the 21st belonged to the Bank, the Trust Company was at liberty to pay it out on the drafts or apply it on the indebtedness of the Bank, and plaintiff cannot follow and reclaim it.

This is what occurred with respect to the collection of the check: Plaintiff deposited it with the Seattle National Bank, and the latter sent it, together with a number of other checks drawn on Yakima banks, the total of which exceeded $51,000, to the Central Bank for collection. The Central Bank was not a member of the Yakima clearing house, but availed itself of the clearing house facilities by clearing through the Yakima Valley Bank, a member bank. On the morning of the 21st, the date it received the items for collection from the Seattle National Bank, the Central Bank placed those items, together with a number of other checks drawn upon Yakima banks which it held, the total amount exceeding $58,000, with the Yakima Valley Bank for collection through the clearing house. The procedure in collecting through the clearing house was described, though not very clearly, by the witness Lemon. (Tras., 35-40.) Enough appears, however, to show that the Yakima clearing house was of the

usual clearing house type, and afforded a means for the common presentment and exchange of checks and similar obligations held by each member of the association against every other member, and a settlement of the resulting differences in their accounts against each other. 7 Corpus Juris, 896. The usual clearing house procedure is substantially as follows:

> "In practical operation it is a place where the representatives of all the national banks in this city meet, and, under the supervision of a competent committee or officer selected by the associated banks, settle their accounts with each other, and make and receive payment of balances, and so "clear" the transactions of the day for which the settlement is made. These payments may be made in cash or by such form of acknowledgment or certificate as the associated banks may agree to use in their dealings with each other as the equivalent or representative of cash."
> *Crane vs. Fourth St. Bank* (Pa.), 34 Atl., 296.

For an epitome of the rules and procedure of the Seattle clearing house, doubtless a typical association in the State of Washington, and of the conditions upon which a non-member bank may avail itself of the advantages of the association, see *Moore vs. American Sav. Bank,* 111 Wash., 148, 189 Pac., 1010. Concerning non-member banks generally, see 7 Corpus Juris, 899.

Resuming the narrative, apparently all the items presented by the Central Bank through the clearing house on the 21st were paid. However, checks aggregating some $9,000, drawn upon it and held by other Yakima banks, were presented through the clear-

ing house on the same day, so that as a result of the day's clearings the Yakima Valley Bank received but $49,500 for the Central Bank. Of this amount, $1,500 was left on deposit with the Yakima Valley Bank, and $48,000 was sent to the Trust Company for credit to the account of the Central Bank. In settlement of the collections received from the Seattle National Bank, the Central Bank sent it a draft for $51,000, drawn upon the Trust Company. This draft was received and presented for payment in due course, presentment being made and payment refused on the 26th. The Central Bank closed its doors on the 27th. It was not until after this occurred that any objection was made to the method of collecting and settling for the check that was pursued, and it was sought to hold the Central Bank, and through it the Trust Company, as trustee of the proceeds of the collection.

It should be added that it was not contemplated on either side that when the Central Bank made the collection it should hold the money collected as a special deposit, and remit in specie. It was intended that that should be done which was done, *viz.*, that the Central Bank should commingle the money collected with its own funds, and make settlement by a draft drawn upon some other bank in which it had funds on deposit. The Bank had for some time been the Yakima correspondent of and made collections for the Seattle National Bank. The method pursued in this case was the method invariably pursued in making such collections. (Trans., 41-42.) Indeed, it appeared that from the 17th to the 22nd January the

Central Bank had made collections for the Seattle National Bank amounting to $100,000 (including the one involved), and that settlements for all such collections were made by drafts drawn upon the Trust Company. (Trans., 140-141.)

Moreover, the custom of banks with respect to such matters is so established and well known that every one dealing with them is presumed to have been conversant with and to have contracted in contemplation of the custom, and that the courts will take judicial notice of it. *Bowman vs. Bank,* 9 Wash., 614, 38 Pac., 211, *Commercial Bank vs. Armstrong,* 148 U. S., 50, *First Nat'l. Bank vs. Davis* (N. C.), 19 S. E., 280. Every one knows that out-of-town checks are collected through correspondent banks; that a collecting bank does not collect each check directly from the bank upon which it is drawn and remit therefor in specie, but that all the checks it has for collection are thrown into hotchpotch and collected through the clearing house; that the collecting bank will receive nothing from the checks it presents unless the balance of the day's clearings chances to be in its favor, and in any event will receive nothing but the difference between the amount of the checks which it presented and the amount of the checks which were presented against it; and that therefore remittances to cover collections will be made from the bank's general funds, and not from the specific money collected. What every one knows the courts will judicially notice, so, as above remarked, they will judicially notice the custom of making collections by banks.

Now, whenever it appears, either from the agreement between the parties, or, when there is no special agreement between them, by referenece to the general banking custom, that the collecting bank was not to hold the money collected as a special deposit and remit in specie, but was expected to commingle such money with its general funds and make settlement by means of a draft drawn on another bank, it is uniformly held that when the collection is made the relation between the collecting bank and the customer or correspondent for whom it makes the collection is that of debtor and creditor, and not that of trustee and *cestui que trust.* In *Bowman vs. First Nat'l. Bank,* 9 Wash., 614, 38 Pac., 211, the facts and the opinion of the Court thereon were as follows: Plaintiffs (respondents in the Supreme Court) sent a draft, drawn upon third parties, to the defendant bank for collection. The bank collected the draft, and in settlement sent plaintiffs its draft, drawn upon a New York bank. Before that draft reached plaintiffs, the defendant bank closed its doors, and when it was presented to the drawee, payment was refused. Plaintiffs brought suit against the defendant bank and its receiver, seeking to establish that the money collected was a trust fund. It was held they could not recover; that a trust relation was not involved, but merely that of debtor and creditor:

> "It follows that, in our opinion, the transaction, even if uninfluenced by any action of the respondents after the collection was made, would have established between them and the defendant bank the relation of creditor and debtor, and not

> that of *cestui que trust* and trustee. But, if this were not so, the act of the respondents in receiving the draft, and forwarding it for collection, would clearly show an intent on their part to pass the title to the specie collected to the defendant bank, and accept its responsibility as drawer of the draft of which they were the payees in lieu thereof. They accepted such draft without objection, and disposed of it in the usual course of business, and by so doing put themselves in the same relation to the bank as they would have been if they had forwarded the money, and directed it to send its draft or certificate of deposit therefor."

Another pat decision is *Hallam vs. Tillinghast,* 19 Wash., 20, 52 Pac., 329. The findings of fact in that case were that plaintiff (respondent in the Supreme Court) deposited an out-of-town draft with a bank for collection; that he "delivered said draft to said bank for collection only and for no other purpose;" that he "never deposited or agreed to deposit the proceeds of said draft or any part thereof with said bank;" and that the bank suspended payment a few days after the draft was collected. It was again held that no trust relation was involved, and that the proceeds of the collection could not be pursued as a trust fund.

> "There is no contention that there was any agreement that the particular money should be preserved in specie. In fact, it must be presumed, under the custom stated, that the particular money paid to satisfy the draft was never received by the bank here, as following the custom, the draft would be sent by the bank to its correspondent where the draft was payable, for collection, and, when paid, under such custom the specie would

> not be remitted, but the bank sending the draft would be credited with the amount merely, and such matter left for future settlement in the balancing of accounts. The respondent was bound to know this custom. The fact that he never specially agreed to deposit the proceeds of the draft with the bank made no difference. If he wanted to except it from the usual custom there should have been an agreement that the specific money should be set aside for him, or disposed of in some particular way, or, at least, that upon the payment of the draft a like amount should be segregated from the general funds of the bank and kept for him, thus keeping the proceeds in a special substituted form. Had this been done prior to the insolvency of the bank no doubt a trust would have resulted as against the receiver, if the particular proceeds in either the original or substituted form came into his possession."

In *Commercial Bank vs. Armstrong*, 148 U. S., 50, a bank in Cincinnati agreed to collect items at par for a bank in Philadelphia and remit every 10 days. The Cincinnati bank failed, and the Philadelphia bank filed a bill of complaint seeking to charge its receiver as trustee of the proceeds of sundry collections. The items were divided into two classes. The first included the items which had not been collected when the Cincinnati bank failed; the second included the items which had been collected before it failed. It was held that the plaintiff was entitled to recover on account of the first class, because until a collection was made the relation between the Philadelphia bank and the Cincinnati bank was that of principal and agent. It was held, however, that it could not recover on account of the second class, because the relation of

principal and agent ceased as soon as the collection was made, and the relation of creditor and debtor supervened. Affirming the decision of the Circuit Court, which had held there could be no recovery of the second class on the theory that the amounts collected could not be traced, the Supreme Court said:

> "We think, however, a more satisfactory reason is found in the fact that, by the terms of the arrangement between the plaintiff and the Fidelity, the relation of debtor and creditor was created when the collections were fully made. The agreement was to collect at par, and remit the first, eleventh, and twenty-first of each month. Collections intermediate those dates were, by the custom of banks and the evident understanding of the parties, to be mingled with the general funds of the Fidelity, and used in its business. The fact that the intervals between the dates for remitting were brief is immaterial. The principle is the same as if the Fidelity was to remit only once every six months. It was the contemplation of the parties, and must be so adjudged according to the ordinary custom of banking, that these collections were not to be placed on special deposit and held until the day for remitting.
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> Bearing in mind the custom of banks, it cannot be that the parties understood that the collections made by the Fidelity, during the intervals beween the days of remitting, were to be made special deposits, but on the contrary, it is clear that they intended that the moneys thus received should pass into the general funds of the bank, and be used by it as other funds, and that when the day for remitting came, the remittance should be made out of such general funds."

The principle of the above case was reaffirmed in *Evansville Bank vs. German-American Bank,* 155 U.

S., 556. It was applied in *First Nat. Bank vs. Wilmington Ry.* (C. C. A. 4th Circ.), 77 Fed., 401, and *Richardson vs. Louisville Banking Co.* (C. C. A. 5th Circ.), 94 Fed., 442.

The fact that in the Commercial Bank Case the agreement was that remittances should be made at stated intervals—every 10 days—while in the present case the implied agreement was to remit as soon as the collection was made, does not differentiate the two cases. Unless there is a special direction that the proceeds of a collection shall not be commingled with the bank's funds, but shall be held as a special deposit and remitted in specie, the collecting bank will, under the custom of banks, be merely a debtor for the amount of the collection. *Hallam vs. Tillinghast, supra.* It is the commingling of the money collected with the bank's funds that causes that result, and it is immaterial whether the commingling was for a few hours or a few days. It was remarked in the Commercial Bank Case that it was immaterial that the remittances for the collections were to be made at such short intervals. However, an attempt to distinguish that case because of the agreement that the remitances were to be made at stated intervals was made in *First Nat'l Bank vs. Davis* (N. C.), 19 S. E., 280, where the agreement was that the remittances were to be made immediately. Holding the attempt to distinguish futile it was said:

> "It is true that, in the cases cited above, the contracts provided that the collecting bank should remit, not daily or on the day of collection, but

at stated periods. But we do not think that the difference in the terms of the contracts can make the principles fixed by those high authorities inapplicable here. The test is, did the plaintiff bank agree, expressly or impliedly, that the proceeds of drafts, checks, etc., sent by it to its collecting agent, the Bank of New Hanover, should not be held by the latter as a special deposit, but merely mingled with the other funds coming in and used in the daily intricate payments and collections of its usual business? Such an understanding or agreement does not appear to us at all inconsistent with the expressed stipulation that remittances should be made each day. This stipulation only required that that should be done each day which, under the contracts under consideration in the cases cited above, was to be done, not daily, but at longer intervals. The important point is not, as we have said, where or how often the remittances were to be made, but whether it was understood that the collecting bank could and would transact the business as it did, treating the checks, drafts, etc., sent it as its own in its daily transactions, keeping memoranda or book entries to show how much was due to the plaintiff and to other banks for whom it was doing like services, and then, at a convenient hour and in some convenient way, transferring to the plaintiff bank the money due to it. The manner of keeping the account was immaterial—a mere matter of bookkeeping. If, under the contract, it was not wrongful for the Bank of New Hanover to use money coming to it from the collection of plaintiff's drafts, checks, etc., as its own, and remit other money, or other checks and drafts, to the plaintiff therefor, then it must be that there was no breach of trust or unlawful conversion in the conduct of the officers of the Bank of New Hanover in the conduct of this business for plaintiff. It seems to us plain that both banks must have clearly understood that

> the relation of principal and agent as to any particular check or draft sent for collection ceased just as soon as cash or its equivalent was received by the collecting bank, and that immediately there was substituted for that relation, as to that cash, the relation of debtor and creditor."

At any rate, the decisions of the Supreme Court of Washington bearing upon this subject ought to be followed, especially when there is no conflict between them and the decisions of the Supreme Court of the United States. The Trust Company and Central Bank are both Washington corporations, and plaintiff is domiciled and engaged in business in Washington. All the transactions upon which the action depends occurred in Washington. This Court has undeviatingly held that where a cause of action wholly arose within a given state, and the matters involved were of merely local concern, the applicable decisions of the courts of that state ought to be followed. *Old Colony Trust Co. vs. Tacoma,* 230 Fed., 389, *American Surety Co. vs. Bellingham Nat'l Bank,* 254 Fed., 54, *Columbia Digger Co. vs. Sparks,* 227 Fed., 880. In so holding it is in accord with the Supreme Court. *Sim vs. Edenborn,* 242 U. S., 131, *Bamberger vs. Schoolfield,* 160 U. S., 149, *Detroit vs. Osborne,* 135 U. S., 492.

Plaintiff, we assume, will endeavor to escape the effect of the cited decisions by the claim that the Central Bank was insolvent when it received and collected plaintiff's check, and that consequently it was a fraud upon plaintiff, warranting rescission of the contract between the parties and holding the Bank as a trustee

ex maleficio, for the Bank to make the collection in the manner it did.

That the Bank was insolvent will be conceded. It is evident that it could not have gone through the deflation period, meeting all the demands which would inevitably have been made upon it, without outside assistance. It will be conceded, also, that under certain circumstances the insolvency of a bank at the time it receives a deposit or undertakes a collection is cause for rescinding the contract and holding the bank as trustee. Mere insolvency, however, is not enough to have that effect. The contract cannot be rescinded unless the bank was guilty of fraud in entering into it. The right of rescission in such a case is based, by analogy, upon the right of a vendor of goods to rescind a sale he has made to a trader who is hopelessly insolvent, who knows he cannot and will not pay for the goods, and yet obtains credit for them on the strength of his apparent solvency. It follows that a contract with an insolvent bank cannot be rescinded and it be held as trustee unless it was hopelessly and irretrievably insolvent, and was known by its managing officers to be so, as the result of which they knew when the contract was entered into that the bank could not and would not pay the money which was the subject of the contract. *St. Louis, etc. Ry. vs. Johnston,* 133 U. S., 566. In *Craigie vs. Hadley,* 99 N. Y., 131, a leading case upon this subject, the suit was to recover a deposit made on the 13th of a given month. It was said:

> "The bank was not only irretrievably insolvent, but it had apparently given up the struggle to maintain its credit before the deposit was made. Its drafts had gone to protest on the 12th, and it was manifest that a condition of open insolvency must immediately ensue. The acceptance of the deposit under those circumstances constituted such a fraud as entitled the plaintiffs to reclaim the drafts or their proceeds."

The bank's officers having knowledge, as they of course did, that it must close its doors in a few hours, it was held the contract could be rescinded and the amount of the deposit recovered.

In *Raynor vs. Scandinavian-Am. Bank,* 22 Wash. Dec., 46, deposits were made in the defendant bank on the same day that the bank commissioner (examiner) closed its doors. The Court held that as "the evidence conclusively shows that the bank receiving the checks as a deposit was hopelessly and irretrievably insolvent at that time, and was then known to be so by its managing officers," the bank was guilty of fraud in receiving the deposits which warranted rescission and recovery of the deposits.

In *Furber vs. Dane* (Mass.), 90 N. E., 859, in speaking of known insolvency as a fraud it was said:

> "The effect of this fraud is to make the bank a trustee *ex maleficio.* But the depositor must show that a real fraud has been practiced upon him, and to do this he must show affirmatively both that the bank was actually insolvent when it received his deposit and that its managing officers then knew this to be the fact."

Actual fraud, then, is the touchstone of the right

to rescind, and guilty intent is the touchstone of actual fraud. Good faith is destructive of both, and there can be no rescission if the managing officers of a bank in good faith believed, at the time it entered into a business engagement, that it would be able to respond thereto. The bank may be insolvent, its managing officers may know that it is so, may know that it is in a serious condition, may know that any untoward occurrence or the disappointment of hopes for succor which they entertain will cause it to close its doors, yet if they in good faith believe that it will be able to surmount its difficulties they are justified in keeping its doors open and making the every day engagements of the banking business. If their belief or hope proves unfounded, and the bank is forced to close, persons dealing with it cannot claim a fraud was perpetrated, and hold the bank or its liquidator as trustee.

> "If the president and officers of the bank knew or believed that the bank was hopelessly and irretrievably insolvent at the time of receiving the deposit of the complainant, then a fraud was undoubtedly committed by the bank upon the complainant, for which there should be a remedy. But fraud must be proved, and is not to be presumed, and the burden of proof is on the complainant. The mere fact that the bank was in an embarrassed condition, by reason of the large indebtedness to it from its president, is not sufficient of itself to establish the fraud alleged in this case. A trader, whether a corporation or an individual, may be struggling in the straits of financial embarrassment, but with an honest hope of weathering the financial storm and of being eventually solvent. Property received by such an individual or concern in the ordinary course of business dur-

ing the period of such embarrassment becomes honestly theirs, and the fact that their expectations were unrealized, and their hopes not well founded, would not fasten upon them a fraud that would vitiate their business transactions."

Quin vs. Earle, 95 Fed., 728, 732.

"However, the mere fact that the bank is known to be insolvent at the time the deposit is received is not in our opinion sufficient of itself, without more, to confer this right of rescission upon the depositor, and such right of rescission would not arise when the bank at the time of receiving the deposit, although embarrassed and insolvent, yet had reason to believe that by continuing in business it might retrieve its fortunes; the necessary condition upon which the right of rescission is predicated being that the deposit was received when the bank was hopelessly embarrassed and so circumstanced as to constitute its receipt of the deposit a fraud upon the depositor. See St. Louis Ry. Co. vs. Johnston, *supra*, at pages 576, 577.

In the present case it merely appears that the bank was insolvent at the time this deposit was received, and had been known to be insolvent for ten years previously by the cashier who received the deposit. The extent of its insolvency at that time is not shown, nor is there any evidence as to what subsequent events precipitated the condition which caused its doors to close, or whether or not at the time the deposit was received the bank, although embarrassed and insolvent, yet had reasonable hopes that by continuing in business it might retrieve its fortunes, just as it had previously continued in business for the ten preceding years during which it had been insolvent."

Brennan vs. Tillinghast, 201 Fed., 609, 615.

"The mere fact of insolvency at the time the deposit was received is not sufficient to justify a finding of fraud, but the insolvency must be of

such a character that it was manifestly impossible for the bankers to continue in business and meet their obligations; and that fact must have been known to the bankers, so as to justify the conclusion that the bankers accepted the depositor's money knowing that they would not and could not respond when the depositor demanded it. It is fraud that must be proved. An honest mistake as to the condition of the bank and an honest belief in the solvency of the institution, if it exists, negative the conclusion of the fraud upon which the plaintiff's cause of action must depend."

Williams vs. Van Norden Trust Co., 93 N. Y. Supp., 821, 823.

In a case in which a closely allied question was involved, the Supreme Court has dealt with the effect of actual insolvency upon ordinary banking transactions in the absence of proof of knowledge and intent on the part of the bank's officers. The receiver of an insolvent national bank sought to avoid certain payments and remittances made by it within a few days before its doors were closed, proceeding on the theory that these were transfers in contemplation of insolvency, and so forbidden by §5242, Rev. Stat. There was no question of the insolvency of the bank at the time, and it was insisted that this insolvency must have been known to its officers, and that therefore they intended a preference. Holding otherwise, the Court said:

"It is a matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in

> the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided.
>
> * * * And the evidence fails to disclose any intention or expectation on the part of its officers to presently suspend business. It rather shows that, up to the last, the operations of the bank and its transactions with the Chemical National Bank were conduced in the usual manner. It may be that those of its officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the defendant bank."
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> *McDonald xs. Chemical Nat'l Bank,* 174 U. S., 610, 618.

For other cases holding there could be no rescission although the managing officers knew the bank to be insolvent, but did not believe it to be hopelessly and irretrievably so, see *Terhune vs. Bank*, 34 N. J. Eq., 367, *Perth Amboy Gas Co. vs. Middlesex County Bank* (N. J.), 45 Atl., 704, *New York Brew. Co. vs. Higgins*, 29 N. Y. Supp., 416, *Stapleton vs. Odell*, 47 N. Y. Supp., 13, *Goshorn vs. Murray*, 197 Fed., 407 (affirmed on this point but reversed on another in 210 Fed., 880).

Under the doctrine of the above cases, it cannot be reasonably contended that the Central Bank was guilty of fraud in undertaking the collection of plaintiff's

check and handling the collection in the customary manner. The manner in which the Bank became insolvent, and the circumstances under which it suspended payment, dispel any notion that its officers then knew it to be hopelessly insolvent, and that it would be unable to pay plaintiff the money collected. On the contrary, the circumstances show that the officers of the Bank did not believe its case to be hopeless until almost the moment that its doors were closed. Here was the manner in which it came to grief: Yakima is a purely agricultural country, and the record shows that the Bank's loans were wholly to agriculturists or to persons whose business was dependent on them. The deflation period caused a contraction of money and shrinkage of bank deposits. The deposits of the Bank declined from $665,753 in November, 1920, to $426,151 on 25th January, 1921. The $240,000 which it was thus obliged to pay out had to be obtained by the Bank from some source. When it endeavored to collect the money from its borrowers it found them unable or unwilling to pay. The same influences which had caused deposits to shrink had caused people to stop buying, so far as possible, and prices to fall. The agriculturists of the Yakima country were either unable to find a market for their produce, or could only dispose of it for ruinous prices. In the majority of cases the Bank was unable to enforce payment, and in cases where it could enforcement would have meant ruin to the borrower. Drastic measures would probably react on the Bank, for the rumor would go abroad that it must be in straits,

else it would not deal so harshly with its customers, and a run on it might result. In any event it was indisposed to bring too much pressure to bear, for its officers, like all other Yakima bankers and business men, shared in the optimism of the producer, and believed that in 60 or 90 days conditions would improve and produce could be moved at a fair price. All these things appear from the Buckholtz letters, of which more will be said hereafter, and which clearly reflect conditions as they were in January.

But in the meantime, as subsequent events show, the Central Bank was slowly bleeding to death. To keep up its credit it was necessary that it should make some loans, there was a steady, if gradual, withdrawal of deposits, and the banking act required it to maintain a cash reserve of 15% of its total deposits. The collections it could make without resorting to unduly harsh measures were insufficient to enable it to meet these demands, so it sought assistance from the Trust Company, Unfortunately, however, the Bank's officers had permitted it to become overloaded with an undesirable class of paper, some of which was uncollectible, and a large part of which was non-liquid, *i. e.*, not capable of being realized on in the desired banking period of 60 to 90 days. As a result, after the Central Bank was in the debt of the Trust Company to the amount of $185,000 to $190,000, and needed still more money to carry it to the improved conditions which the Yakima people were certain was right around the corner, it had nothing to offer except "good but slow" paper, *i. e.*, paper which would not be paid before the

1921 crops were marketed. The Trust Company was exceedingly reluctant to make further advances on such security, but, as we have seen from Triplett's letter of the 24th heretofore referred to, it did agree to make an additional advance of $30,000 on "good but slow" paper. However, the presentation of the $51,000 draft, payment of which would have meant an overdraft of $27,000 with no arrangements for covering it, prevented anything being done with this offer. It was the dishonoring of that draft on the 26th that made the Bank's case hopeless, but even then neither the Bank's officers nor the State bank examiner believed it would be forced to suspend payment. They thought its assets good, albeit slow of collection, and that the other Yakima banks would rather take over slow paper, on which they would not ultimately lose anything, than to permit a bank to close in their midst, with the unsettling of their own credit that would result. It was not until after the Yakima bankers, gathered together in conference upon the situation, had declared much of the Bank's paper worthless, and that no reasonable amount would save the Bank, that its officers and the bank examiner appreciated there was no hope for it. Doubtless the Bank's officers ought to have known the worthless character of much of its paper as well as the other Yakima bankers did after they saw it, but the important fact is that they did not. And it is their ignorance of the true situation that relieves the Bank from the imputation of fraud in the transaction complained of.

Developing the evidence against the fraud theory

step by step, it is first to be remarked that Washington has a complete banking code, and that the State is given plenary power over the supervision and regulation of State banks. The bank commissioner (examiner) is required to visit each bank at least once in a year, and oftener if he thinks necessary, for the purpose of making a full investigation of its condition. Whenever he finds a bank in an unsound condition or doing business in an unsafe manner he is required to close its doors, take possession of its assets, and wind up its affairs, the courts being deprived of jurisdiction to appoint receivers or in any other way interfere with the examiner's control thereover. Session Laws 1917, pp. 272-3, 300-5, Remington's Comp. Statutes 1922, §§3214, 3266-80. An examination was made of the Central Bank in June, 1920. While the examiner disapproved of some of the methods of Ellis, cashier and manager of the Bank, he entertained no doubt of the Bank's solvency, for his suggestions as to its methods were merely in the way of recommendations, which the Bank was at liberty to accept or disregard, as it pleased. In December, only about a month before the Bank's doors were closed, the examiner did request Barghoorn, the Bank's president, to remove Ellis and put another man in his place. Even then the examiner did not regard the situation as exigent, and was satisfied with Barghoorn's promise that the change would be made as soon as a suitable man to succeed Ellis could be found, and the change could be made without causing trouble. (Trans., 62-65.) Owing to rumors relative to the

Bank's condition which had reached the examiner, he went to Yakima to make another examination of it in January, reaching there the morning of the 26th. Before he went he had been informed of the outstanding draft for $51,000, and understood that the Trust Company would not pay it. Knowing this, when he looked over the Bank's balance sheet on the morning of the 26th he saw that the situation was grave, and that immediate steps would need be taken to raise the money to meet the draft. He therefore went to the other Yakima banks to get assistance from them. Representatives from those banks spent the day and night of the 26th, and well into the forenoon of the 27th, in going over the paper owned by the Central Bank, and it was owing to the discouraging view taken by them of its paper that he finally concluded its doors must be closed. Yet he testified that when he began the examination on the morning of the 26th he saw no reason for taking over the institution, and it was only the opinion expressed by the representatives of the other Yakima banks of the quality of its paper that caused him to take that action. He said, however, that he believed that with the amount of assistance suggested (from $75,000 to $100,000), the trouble could have been tided over and the bank have survived, and that in his opinion subsequent developments had shown his belief to be justified. (Trans., 63-64.)

Turning to the officers of the Central Bank, those who directed its affairs, and so were responsible for its continuance in business and the engagement into which it entered with plaintiff, were Barghoorn, its

president, and Ellis, its cashier and, by reason of Barghoorn's non-residence, actual manager. There were a vice president and directors, but they were never mentioned in connection with the Bank's operations, and the evidence shows them to have been merely titular officers, who knew nothing of and had nothing to do with the Bank's affairs. (Trans., 67.) Now, the Bank's failure was caused by a withdrawal of deposits, falling markets and consequent inability to make collections, and an overload of non-liquid and bad paper. The last factor was the one that caused the final crash, for there is no doubt that if the Bank's paper had been liquid, or even good, albeit slow, it would have had no difficulty in obtaining enough assistance from the Trust Company or other banks to keep going. Barghoorn and Ellis knew, of course, of the withdrawal of deposits, the difficulty in making collections, and the consequent embarrassment of the Bank for ready money, but it is evident they did not know of the doubtful quality of the paper it held until the very last; not, indeed, until the other Yakima bankers sat in judgment on it on the 26th and 27th, and condemned much of it as utterly bad. As a result of this ignorance they did not think the Bank was in any danger. They confidently expected conditions would become better; that withdrawal of deposits would cease, markets improve, and collections be easier. But if those things failed them, they entertained no doubt of being able to obtain all the money necessary by borrowing upon collateral or rediscounting notes, for they had no doubt of the quality of the paper they had to offer

for those purposes.

We first take up Ellis, because he was the man on the ground, the man upon whom the chief responsibility rested, for Barghoorn did not live in Yakima and was seldom there. Ellis became an officer of the Central Bank in February, 1920, less than a year before it suspended. He soon incurred the criticism of the State banking department. After the June examination the examiner formed the opinion that Ellis was too optimistic, was not informed concerning the Bank's loans, and that his system of keeping accounts was slovenly. He was inclined to excuse Ellis to some extent because of the short time Ellis had been with the Bank, but wrote Barghoorn calling attention to some of Ellis' shortcomings. In December, about a month before the Bank closed, the examiner again wrote Barghoorn, this time requesting that Ellis be removed. About the same time the examiner chanced to see Barghoorn personally in Yakima, and went over the grounds of complaint against Ellis. These were that Ellis was an optimist; that he overestimated the resources of the Bank; that he did not take sufficient account of falling prices; and that he was disposed to expand rather than contract. In view of falling prices and continued deflation, the examiner thought "a man of far sterner stuff" than Ellis was needed in charge of the Bank. (Trans., 62-65.) Barghoorn expressed a willingness to comply with the examiner's request, but said it would be necessary to clean house gradually; that because of Ellis' wife and children he was loath to discharge Ellis; but that he

was endeavoring to get hold of a suitable man to take charge of the Bank, and as soon as he could do so would put him in Ellis' place. (Trans., 63.) As will be shown under a subsequent head, it was in pursuance of this request from the examiner that Barghoorn soon after employed Buckholtz and sent him to Yakima, intending that he should ultimately take Ellis' place.

Ellis, testifying for plaintiff, said that he knew of the examiner's criticism. While denying, naturally, that he was in any way at fault, he admitted that the criticism of his ignorance of the Bank's loans was justified. He excused his want of knowledge by the fact that he had been with the Bank but a short time, saying that it was utterly impossible for him to familiarize himself with the character of its paper in so short a time. (Trans., 95, 97.)

A strong sidelight is cast upon Ellis' disposition by Buckholtz' letters to the officers of the Trust Company. In a number of incidents Ellis' unquenchable optimism and easy going nature appear. A sale of the Central Bank was in prospect, which would apparently have solved the Bank's financial problems, and Ellis was at all times entirely confident it would go through. (Trans., 148.) Ellis saw advancing prices, good crop movements, and abundant money for the Bank's needs coming in. In trying to arrive at the true situation Buckholtz heavily discounted his figures and took all his estimates with a large allowance of salt. (Trans., 223.) Ellis was inept in the enforcement of collec-

tions. Borrowers whose notes were overdue would receive considerable sums, and notwithstanding the need of the Bank for money Ellis would permit them to renew their notes and use their money elsewhere. That sort of thing became so flagrant that Buckholtz finally took Ellis to task, and strongly intimated that in the future Ellis must not meddle with such matters, but leave them to Buckholtz. (Trans., 184-191.) The letters, in short, show Ellis in the same light that the testimony of the bank examiner shows him, and prove that because of his optimism and easy going nature he did not sense the situation, and had no idea that the Bank was insolvent or in any way embarrassed. The examiner, the administrative officer whom the State had charged with control over the Bank, said that Ellis was incompetent but not dishonest. (Trans., 62.) The courts ought not, on mere suspicion, to override that official's judgment.

Next of Barghoorn. He lived in Spokane, had many other business interests besides his interest in the Central Bank, and was seldom in Yakima. He became a shareholder in the Bank in May, 1919, and its president in January, 1920. Where, as here, a bank's failure is not due to the dishonesty of its officers, but to its inability to realize upon its loans as need arose, knowledge of its insolvency cannot be charged to a particular officer unless he is shown to have known of the character of the loans. In the nature of things, Barghoorn, who had never lived in Yakima, who had been connected with the Central Bank but a short time, and who was not in charge

of its daily operations where he might more quickly have obtained information concerning its borrowers, could have no discriminating opinion of its loans. Of necessity he would have to rely largely, if not wholly, upon the opinions of others. The testimony permits no doubt that Barghoorn believed the loans of the Central Bank to be of a high character, and that, while the Bank was temporarily embarrassed by a shortage of cash, there could be no doubt of its solvency if the temporary trouble was overcome. The bank examiner, who went from Spokane to Yakima with Barghoorn on the night of the 25th, after it was known that the Trust Company would refuse to pay the $51,000 draft, said that from his conversation at that time with Barghoorn he believed Barghoorn "had no suspicion whatever that the bank was going to have to close; that while he was cognizant of the danger of a cash shortage, he didn't question the worth of his assets." (Trans., 64.) At another place in his testimony he said of Barghoorn that "his attitude was more that of fearing a collapse of the credit of the bank and an apprehension over being able to provide cash for the situation, rather than a fear of the intrinsic worth of his assets." (Trans., 65-66.) If such was Barghoorn's point of view on the 25th, two days before the Bank closed, and after he knew that the Trust Company would not pay the $51,000 draft, it is beyond belief that on the 21st, when everything was moving smoothly, he believed the Bank to be insolvent, to say nothing of being hopelessly and irretrievably so.

In speaking of Barghoorn, it must be kept in mind that on the 21st he could have had no inkling of trouble in securing continued assistance from the Trust Company. He was a director of the Trust Company from 1908 until the 11th January, 1921, when he retired of his own volition. (Trans., 49, 122.) His relations with its officers, naturally, were very friendly. It had been exceedingly liberal in its financial aid to the Bank, and it was not to be supposed that it would discontinue that aid so long as the Bank had good paper to offer for security or rediscount. Inasmuch as Barghoorn entertained no suspicion of the good quality of the Bank's paper, it is apparent that on the 21st he expected an uninterrupted continuance of such financial aid from the Trust Company as might be necessary. And it is his expectation or hope on the 21st, the day plaintiff's check was collected, which is determinative of whether there was fraud in the transaction.

Perhaps the most convincing evidence that no one connected with the Central Bank thought it hopelessly insolvent are Buckholtz' letters to the officers of the Trust Company. They have no direct bearing upon the question of whether the Bank was guilty of fraud in that, being hopelessly insolvent, it received and collected plaintiff's check, for Buckholtz was not an officer of the Bank and had no voice in whether it should close or remain open, in whether the collection should be undertaken or refused. His individual opinion concerning its solvency would therefore have no more effect upon the direct question of its fraud

than would the opinion of any mere clerk in the Bank. Moreover, he had been with the Bank less than a month, and his opinion concerning the worth of its assets, and consequently of its solvency, would not have much weight. He was in a position, however, to sense the feeling of the officers of the Bank concerning its condition. He was there to succeed Ellis ultimately, and in the meantime to assist Ellis in conducting the Bank through the deflation period. He saw all that was going on, and if the Bank's officers were apprehensive of its solvency he would have known it. His letters may therefore be said to afford a peep behind the scenes and to disclose what went on in the Bank during the last month of its existence. They are more satisfatcory than any after-the-event testimony would be, for no doubt can be entertained of their sincerity, and that they honestly reflected conditions as he saw them. He had long been an employe of the Trust Company, and was very friendly to its officers. It was upon their recommendation that he had been given the opportunity at Yakima, whereby, if things had gone well, he would have succeeded Ellis as virtual head of the Central Bank. While his letters show him entirely faithful to his new employer, they also prove him loyal to his old employer in all the things of which he wrote. There was no inconsistency in his attitude, for it is evident that Barghoorn did not desire to overreach the Trust Company, or to obtain support from it to which the Central Bank was not properly entitled. From the first, then, the letters show Buckholtz endeavoring to

put matters before the Trust Company fairly. In offering paper for rediscount, he stated its good points, but did not endeavor to conceal disadvantageous features. In speaking of the present and forecasting the future, he wrote freely of conditions about Yakima and in the Central Bank. He told of falling prices, scarcity of money, the difficulty in making collections and keeping up the Bank's cash reserve. Reading the letters in their entirety, no doubt is left in the reader's mind that Buckholtz never, until after the Bank closed its doors, believed it to be hopelessly insolvent, but on the contrary thought that the only difficulty it had to contend with was in keeping up its cash reserve for 60 or 90 days, when, according to the prognostications of all the Yakima wiseacres, bankers and others, crops would begin to move and money and collections be easier. There are too many of these letters to permit of reference to them at length, but we refer briefly to some of them, these extracts being typical of the vein that runs through them all.

It should be premised that it appears from this correspondence that negotiations for a sale of the Central Bank were pending all through the month of January; a sale, it would seem, that would relieve the Bank's (supposedly) temporary cash shortage, and that all concerned in its affairs considered the sale as an alternative relief in the event that business conditions did not improve.

Under date of 9th January, Buckholtz, writing to

Mr. Rutter, president of the Trust Company, said that he was confident "that we can get by and liquidate our indebtedness within 90 days, provided of course that the products held here will sell at all at reasonable figures." Failure to move the products he thought was "not so much a matter of holding for better markets but a matter of light demand temporarily." The matter of making a sale, and Ellis' firm conviction that it would go through, were referred to. The writer said, however, that he was not depending on that in making his forecast, but on the liquidation which he thought would be possible without bringing so much pressure to bear as to do the Bank injury. (Trans., 148.)

Under date of the 17th, in a letter to Triplett, Buckholtz spoke of the marketing difficulties produce growers were having, and the belief of other banks that produce would shortly move and relieve conditions. He said that he was going to keep pounding along, but that "I don't expect to do any great volume of liquidating until February or March. I am figuring on from $100,000 to $150,000 out of hops and apples during the next 90 days. If these two items don't move, we are going to have some mighty hard sledding and it won't be this bank alone." In the same letter he said that deposits were holding up well, and that they expected to get a $50,000 deposit of county funds the last of Febuary or first of March. (Trans., 179, 181.)

Writing Triplett on the 19th, Buckholtz acknowl-

edged the justice of Triplett's criticism, made some days before, respecting the Central Bank's way of handling rediscounts, but said that "no doubt for some weeks it will remain a question of which is preferable to you—overdrafts or past due rediscounts." He proposed a $20,000 increase in rediscounts if the Trust Company would take "stuff that will not be paid until 1921 crop returns are in." (Trans., 198.)

On the 21st he wrote that he had talked with other Yakima bankers, that they also were carrying a heavy burden, but that they were all "more or less confident of a good washing out of stuff during the next 90 days" through miscellaneous crop movement. This, he said, was the only chance "to liquidate our borrowed money down to a reasonable amount and maintain a cash reserve." He closed in a semi-jocose vein by likening the Central Bank to a man at the point of death, but with a hopeful doctor on the job who was able to discern signs of improvement, "and speaking to the patient's wife and children, you would say that he had good chances for complete recovery." (Trans., 219-221.) That he did not intend the comparison to be taken too seriously is evidenced by the fact that two days later, on the 23d, he sent Mr. Rutter a "list of loans which I think can be collected in full during next 90 days aggregating $147,941." This amount, it was stated, did not include "partial reductions on those which cannot be collected in full." From the partial payments he expected an additional $50,000. Ellis' figures, he said, were much more optimistic, but "I have taken con-

siderable salt with his estimates," and the figures given he considered to be conservative. (Trans., 222-223.) And that it was not taken by Triplett to indicate that Buckholtz believed the Central Bank to be in a desperate or even serious condition is proven by the nature of Triplett's reply, written on the 24th, wherein he says that "The patient's friends and family are glad to hear that he is better; that he is no worse, and that he shows good prospects for improvement in the near future." He goes on to say that "this is extremely gratifying," but that the doctor must stay on the job night and day and be prepared for any relapse that may come, at the same time expressing, in the language quoted under the preceding head, the willingness of the Trust Company to stand back of the Central Bank to any reasonable extent if the Bank would furnish the Trust Company a class of paper on which it would not ultimately have to take a loss. (Trans., 224-226.)

In a second and longer letter written to Mr. Rutter on the 23d, evidently intended to give him a full and accurate view of the situation as it appeared to Buckholtz, he began by saying that "The last three days, I have felt very discouraged with the way things are going," and then stated the discouraging factors in detail, among them being the $51,000 draft, of which he spoke as follows:

> "Yesterday, we mailed a $51,000.00 draft on you to the Seattle National Bank covering a large letter of items on other local banks, the net of which has been remitted to you and no doubt we will have a few dollars there to meet it. The

draft will likely reach you Tuesday or Wednesday and if you pay it the overdraft created will be the limit to date of credit advanced this institution. Have Mr. Triplett ascertain the amount of the overdraft created if this draft is paid. If you do not pay it, we are gone."

On the other hand, in the same letter, he said that "business men and bankers here are confident of a good movement (of farm products) during February and March," and that if this occurred "I feel justified in making the statement that I am still confident of cutting down our borrowed money to a nominal amount if not entirely during the next 90 days." Even should the expected crop movement and liquidation fail to occur, and it became necessary for the Trust Company to carry an additional $50,000 of slow paper "which will reach an enormous sum by that time, * * * I believe the possibilities of the institution for future business and earning power to charge off bad paper is here. A bank is needed in this location and a good volume of business is assured, and with close and proper management, there is no doubt in my mind but what the indebtedness carried by the Spokane & Eastern Trust Co. can eventually be worked out and kept within reasonable bounds and worked into a valuable account." Information was asked as to "whether or not you will back the institution and myself any further in case of necessity," and the letter closed with a postscript in which the opinion was expressed that if the Trust Company would advance such additional requirements as might be necessary, which could hardly exceed $50,000 more

at the worst, it would get its money back much more quickly than by letting the Central Bank be closed. (Trans., 227-232.) On the next day, the 24th, in a letter to Triplett the Rutter letter was referred to, and Buckholtz said that "I cannot figure out any chance of keeping the balance in our favor outside of the methods outlined therein." He also said: "Wish you would write me frankly on how the S. & E. feels about things here and whether we can expect you to honor our drafts if the overdraft should go up to $25,000 or a little more, say for ten days or so, and see if something doesn't develop by then." (Trans., 232-234.)

These letters are sincere. They bear upon their face the indicia of honesty. They were written when there was no motive for coloring them or making of them anything but a frank expression of the writer's views and beliefs. And they strip of all pretense to reasonable consideration any claim that on the 21st, the day the Central Bank received and collected plaintiff's check, any one connected with it knew that it was hopelessly insolvent, and that therefore plaintiff would not receive the money collected. The question, be it remarked, is not of what the officers of the Bank might have known, or ought to have known in the exercise of reasonable prudence. It is not a question of incompetence or of negligence but of actual, intended fraud. Only proof of designed fraud; proof that the officers did know, not that they might have known, when they undertook to collect and made the collection, that the Bank was hopelessly insolvent and

that plaintiff would never get the money, will suffice to sustain plaintiff's case. These letters give the lie to the claim that there was knowledge or even apprehension of such a condition. They show Ellis, the man in charge of the Bank's affairs, to have been just such a man as the testimony of the State examiner painted him: illy acquainted with the true character of the Bank's loans, optimistic, inappreciative of the seriousness of the financial crisis through which the country was passing, and without any thought of impending danger. They show Buckholtz, in an endeavor not to be misled by Ellis' optimism, going, as he thought, to the opposite extreme. The Bank had three resources, he considered, to help it through the critical period. The first was the proposed sale. Ellis relied upon this confidently, but Buckholtz put it aside as too uncertain a factor to be depended on. The next was the crop movement in February and March, which all the Yakima bankers and business men expected to occur. If neither of the first two eventuated, then the Bank would have to rely upon the Trust Company to make further advances. No doubt was expressed that the Bank had plenty of good paper to furnish adequate security for such advances; the trouble with it was that it was slow (that is, if the 1920 crop did not move in February or March), and returns could not be expected on it until the 1921 crop. As Buckholtz explained in his testimony, when he spoke disparagingly of the paper it would be necessary to offer for further advances, he did not refer to its ultimate collectibility

but to its want of liquidity; to the inability to realize upon it quickly. (Trans., 128.) It was not until his letters of the 23d and 24th that he expressed any apprehension of danger, and then it was not concerning the ultimate ability of the Bank to pay its debts, but only of its ability to keep up its cash reserve until things took a turn for the better. It must be borne in mind that when those letters were written he had not received Triplett's letter of the 24th, in which it was said that if no deal could be made with "Herb" for releasing the $30,000 Liberty bonds for sale and taking paper in their stead, the Trust Company would take over the debt, if secured by "good but slow" paper, and thus release the bonds for sale. He was, therefore, solicitous to know whether or not the Trust Company "will back the institution and myself any further in case of necessity." It is plain that he hoped, indeed, expected, that it would do so, for he set forth the bright future of the Central Bank if it surmounted the temporary cash reserve difficulty, and the value of its account to the Trust Company. It may be admitted that he was mistaken about the value of the assets of the Bank and the amount that would be required to tide it over, but that is neither here nor there. It is the honest hope or expectation that counts; not the well or ill founded character of the hope or expectation. Banks "may be struggling in the straits of financial embarrassment, but with an honest hope of weathering the storm and of being eventually solvent," and under such conditions "Property received by (them) in the ordinary course of business becomes

honestly theirs." It is not enough to convict them of fraud that "their expectations were unrealized, and their hopes not well founded." *Quin vs. Earle, supra.* In a case where the cashier of a bank had known it to be insolvent for 10 years, it was held that "the mere fact that the bank is known to be insolvent at the time when the deposit is received" is not sufficient to warrant rescission on the ground of fraud; it must also appear that it was hopelessly embarrassed and failure not only certain but imminent. If it "had reason to believe that by continuing in business it might retrieve its fortunes;" if "although embarrassed and insolvent (it), yet had reasonable hopes that by continuing in business it might retrieve its fortunes," there was no fraud, and consequently no right to hold the bank's funds as a trust fund. *Brennan vs. Tillinghast, supra.* "It is a matter of common knowledge," said the Supreme Court, "that banks * * * continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency," there being the hope "that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided." The transactions of a bank doing business under such conditions were not violative of the national banking act although "those of its officers who knew its real condition must have dreaded an ultimate catastrophe," if it did not appear that they intended or expected, at the time of a particular transaction,

"to presently suspend business." *McDonald vs. Chemical Nat'l Bank, supra.* The thing to be ascertained, then, is what the officers of the Central Bank honestly expected or hoped concerning its fate on the 21st, the day the fraud was committed if committed at all. Did they then expect or hope that it would be able to surmount its present difficulties and continue business for some indefinite time; whether long or short is of no moment? Or did they know that it was doomed and must presently close its doors, so that plaintiff would not get its money? If Buckholtz' letters reflect their state of mind, there can be no question but that they expected the Bank would continue business indefinitely, for while in one of his letters written on that day he recognizes the increasing difficulty the Bank is having to maintain its cash reserve, he has various plans for dealing with it, and obviously expects no immediate trouble because of it. That two or three days later he was in a more downcast mood, and thought the Bank must close if the Trust Company would not allow the overdraft caused by the $51,000 draft, is immaterial. Men's moods change from day to day, usually with the state of their digestion or the way they sleep. What we are concerned with here is whether on the 21st the officers of the Central Bank knew it was hopelessly insolvent and would close its doors before plaintiff received its money, or whether they expected or hoped it would remain open for some indefinite time; at least long enough for plaintiff to get its money. We repeat that if Buckholtz' letters are accepted as a reflection of

their state of mind on that day, there can be no doubt that they expected the Bank to remain open for some indefinite time.

It was testified that after the Central Bank closed its doors Buckholtz expressed the opinion that it would not pay more than 30% of its indebtedness. His individual opinion is a matter of no moment, for, as heretofore pointed out, while it was intended that he should ultimately succeed Ellis, he had been given no official position and had no more voice in determining whether the Bank should remain open than any clerk would have. At any rate, what he thought after the Bank closed its doors is no criterion of what he thought before it did so. Subsequent events usually change opinions. Here there was good cause for Buckholtz' change of opinion. In the very short time he had been with the Bank, he could form no accurate opinion of the value of the great mass of its paper. Ellis, who had been with the Bank a year, said that he was not well informed concerning many of its loans because he had not had time to become so, and the examiner excused his ignorance for the same reason. (Trans., 97, 62.) Buckholtz, who had been with the Bank but 20 days, could scarcely be expected to know all about the loans. Just before the Bank closed he got some information concerning them which evidently its officers did not possess. When Stevens, the bank examiner, went into the Bank on the morning of the 26th, he looked at its balance sheet, and saw that immediate steps would need be taken to raise money to pay the $51,000 draft he knew to be out-

standing. He called the Yakima bankers together, and they held a series of conferences, extending through the day and night of the 26th and the morning of the 27th. The note pouch, containing the assets of the Bank, was put before them, and they went through the paper carefully in order to determine how much value was there and how much money would need be raised to tide the Bank over. The more they looked at the paper the less they liked it, and their estimate of the amount of money needed, reasonably low at first, finally reached a point where it was evident that nothing could be done, and that the Bank must close. (Trans., 57-58.) Buckholtz attended all these conferences and followed the estimates of the Yakima bankers. After hearing their estimate of losses, and taking into consideration the Bank's deposits and the amount of paper in the pouch, he thought the Bank would probably not pay more than 30%. He did not recall expressing the opinion imputed to him, but thought it quite likely that he did so, inasmuch as it was in accordance with the idea he formed after hearing the Yakima bankers' estimate of losses on the paper. (Trans., 130-131.)

In considering whether the persons connected with the Central Bank knew it to be hopelessly and irretrievably insolvent on the 21st, and so knowing kept it open, transacting its regular business, for six days longer, it must be kept in mind that a statute of Washington provides that any officer, agent, or employe of a bank who shall accept any deposit, or consent thereto or connive thereat, when he knows or

has good reason to believe that the bank is insolvent, shall be punished by imprisonment for not more than ten years in the penitentiary, or by a fine of not more than $10,000. 1 Remington's Comp. Statutes 1922, §2640. Of course the severity of criminal statutes does not keep men honest, and many bank officers have gone to the penitentiary because of offending against them. In all such cases, however, downright dishonesty, embezzlement or some other form of peculation, lay at the root of the crime. The guilty officers misused the funds of the bank, probably expecting to make the shortage good, but going on from bad to worse until it was impossible for them to extricate themselves. Here the honesty of the officers of the Central Bank is not questioned. No wrongdoing is or can be charged against them, save only that they kept the bank open after they knew it to be hopelessly insolvent. It is inconceivable that men of their standing, innocent of crime or any sort of wrongdoing, would without motive expose themselves to the severe penalties of the statute by keeping the bank open after they knew it to be insolvent.

Summing up, plaintiff cannot recover unless the Central Bank is held to have been a trustee *ex maleficio* of the money received from the collection of plaintiff's check. That cannot be held unless it is said that the managing officers of the Bank were guilty of actual fraud in undertaking the collection; unless it is said that they knew the Bank was hopelessly and irretrievably insolvent, and that when they received the money and sent it to the Trust Company they knew

plaintiff would not get it. The question is not of their incompetence or negligence, of what they ought to have known or might have known. The authorities agree that "It is fraud that must be proved." *Williams vs. Trust Co., supra.* Now, "fraud cannot be established by mere proof of negligence or failure to perform a duty." *Spokane vs. Amsterdamsch Trustees Kantoor,* 18 Wash., 81, 89.

> "Negligence and fraud are not synonymous terms; nor in legal effect are they equivalent terms. Fraud presupposes a willful purpose resorted to with intent to deprive another of his legal rights. It is positive in that the purpose concurs with the act, designedly and knowingly committed. Negligence, whatever be its grade, does not include a purpose to do a wrongful act. It may be some evidence of, but is not, fraud. Gardner vs. Heartt, 3 Denio, 232. Fraud always has its origin in a purpose, but negligence is an omission of duty minus the purpose. People vs. Camp, 66 Hun, 531, 21 N. Y. Supp. 741; Raming vs. Metropolitan Street Ry. Co., 157 Mo., 477, 57 S. W., 268; Cleveland R. R. Co. vs. Miller, 149 Ind. 490, 49 N. E., 445. This distinction was clearly pointed out in Kountze vs. Kennedy, *supra,* 147 N. Y. 129, 41 N. E. 414, 29 L. R. A., 360, 49 Am. St. Rep. 651, the court saying:
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> 'Misjudgment, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit.'"
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> *Reno vs. Bull* (N. Y.), 124 N. E., 144.

The burden, then, is upon plaintiff to prove that when the managing officers of the Central Bank entered into their engagement with plaintiff they knew

that the Bank was hopelessly and irretrievably insolvent, must presently close its doors, and that it would not pay plaintiff the money it collected. The burden is heavier than in the ordinary case, for the sole foundation of plaintiff's case is a charge of fraud. "Fraud," said Mr. Justice Story, "is not presumed. It must at law be clearly and fully established. Suspicion is not enough. Doubtful circumstances are not enough. The balance of the testimony is not to be nicely weighed." *Sanborn vs. Stetson,* 21 Fed. Cas, 314. "Fraud," said Judge Bean in *United States vs. California Midway Oil Co.,* 259 Fed., 343, "is never presumed, but must be established by clear, unequivocal, and convincing proof. Proof which merely creates suspicion is not enough." "Where fraud is alleged it must be clearly and satisfactorily proved by him who alleges it." *Pederson vs. Ry. Co.,* 6 Wash. 202. Fraud cannot "be found upon a bare preponderance of the evidence." *German-Am. Bank vs. Illinois S. Co.,* 99 Wash., 9. The rule is that fraud must "be proved by testimony at once strong, cogent, and convincing." *Morris & Co. vs. Canadian Bank,* 95 Wash., 418. Where circumstances are relied upon to prove fraud, they are not sufficient unless they are inconsistent with honesty, and only consistent with an intent to defraud. If they are of equivocal tendency, as consistent with honesty as dishonesty, fraud is not proven. *Foster vs. McAlester,* 114 Fed. 145; *In re Hawks,* 204 Fed. 309; *United States vs. California Oil Co.,* 259 Fed., 343; *Dunlap vs. Seattle Nat'l Bank,* 93 Wash., 568; *Dart vs. McDonald,* 107

Wash., 537. There is not a scintilla of evidence tending to prove that on the 21st the managing officers of the Central Bank knew it to be hopelessly and irretrievably insolvent, and were aware that in undertaking the collection of the check they were perpetrating a fraud upon plaintiff. The Bank was insolvent, and six days later was forced to close its doors, but those facts, standing alone, do not tend to prove guilty knowledge on the part of its managing officers. They knew that the Bank was having difficulty in maintaining its cash reserve, and probably understood that if conditions did not change and it received no outside aid it might not be able to weather the storm. But they had these resources to look to: (1) The proposed sale; (2) The expected crop movement in February and March; (3) The promised deposit of $50,000 in county funds in February; (4) The continued assistance of the Trust Company. It is of no moment that their hopes and expectations were not realized. If they honestly hoped or expected that the Bank's shortage of ready money would be relieved through these or any one of these avenues of relief, and it would be able to continue business, there was no fraud in the transaction with plaintiff. The evidence permits no doubt that on the 21st they honestly believed that the Bank was in no danger and would continue business indefinitely.

III. *Conceding the existence of a trust relation, the money collected cannot be followed as a trust fund because it was commingled with the funds of the Central Bank, and did not augment its assets.*

To recover in this case, plaintiff must do more than establish a trust relation between it and the Central Bank. It must also show that the money collected augmented the assets of the Central Bank, and can be traced and identified, separate from the funds of the Central Bank. The evidence fails to show this.

For a considerable time (the period is not definitely fixed) the Central Bank had carried an active account with the Trust Company. From day to day, practically every banking day, it would send the Trust Company drafts, checks, and other cash items, to be credited to its account. Also as it needed money it would send notes for rediscount, the amount of which, if accepted, would be credited to it. The magnitude of such transactions is shown by the fact that in October, 1920, it sent the Trust Company cash items (excluding notes or rediscounts) amounting to $421,000; in November, $317,000; in December, $156,000; from the 3d to the 26th January, $151,000; a total of over $1,000,000 for the four months. (Trans., 142.) During January alone it had rediscounts with the Trust Company ranging from $142,000 to over $200,000. (Trans., 118.) The Trust Company was its principal correspondent, more than half of all the drafts it issued being drawn upon the Trust Company. (Trans., 90, 97-98.)

As has been heretofore stated, when the Central Bank received the collection items from the Seattle National Bank, it placed with them other items it held against other Yakima banks, the total exceeding $58,000, and through the Yakima Valley Bank presented them all for clearing. From the amount received through these collections, there was deducted the amount of items presented against the Central Bank, some $9,000, so that the Yakima Valley Bank actually received but $49,500 from the $58,000 in collection items. The Central Bank left $1,500 of this amount on deposit with the Yakima Valley Bank, and sent $48,000 to the Trust Company for credit to the Bank's general account. Before the presentation of the $51,000 draft which the Central Bank sent to the Seattle National Bank in settlement of the collection items received from it, the Trust Company had paid out of the $48,000 remittance a considerable number of prior drafts drawn by the Central Bank upon its general account, so that but $24,000 remained to the credit of the Bank. When it was decided not to allow the overdraft which would have been necessary in order to pay the $51,000 draft, this balance was applied upon a debt which the Central Bank owed the Trust Company.

It is settled law in the State of Washington that in order to recover a trust fund from an insolvent bank two things must concur; the assets of the bank must have been augmented by the receipt of the trust fund, and it must be capable of identification and segregation from the funds of the bank. In *Blake*

vs. State Savings Bank, 12 Wash., 619, 41 Pac., 909, a depositor sought to recover deposits made by him after the bank had become hopelessly insolvent, and was known by its officers to be so. It appeared that the deposits had been received, credited to him, and checked against by him, in the usual way, having thus entered into and become a part of the funds of the bank. It was held that as the "deposits became commingled with the general funds of like character in the bank the means of identification failed and the money could not be reclaimed."

It is evident that the money collected on plaintiff's check was so commingled with the general funds of the Central Bank as to lose its identity. It was put through the Yakima clearing house with all the other checks the Central Bank had for collection on the 21st, a total of over $58,000. In collecting these checks there was deducted from their amount $9,000 on account of checks drawn on the Central Bank and put through the clearing house on the same day. The balance of $49,500 went to the credit of the Central Bank with the Yakima Valley Bank. The Central Bank then drew out $48,000, put it with other funds, and sent the whole to the Trust Company for credit to the general account of the Central Bank. There it was mingled with other funds which had been, and thereafter were, transmitted for credit to the Central Bank, and was subject, and was subjected, to drafts drawn generally against the account of the Central Bank, and to charges on account of overdue rediscounted paper. There was certainly a commingling

of funds and loss of identity equal to that appearing in the Blake Case.

Heidelbach vs. Campbell, 95 Wash., 661, 164 Pac., 247, is not a bank case, but is squarely in point on the effect of commingling funds. Goods were sent to a merchant to be held by him in trust, with the privilege of sale and requirement of accounting to the owner for proceeds of sales. Some of the goods were sold, but the trustee did not keep the proceeds of the sales separate from his funds. Instead he commingled them therewith, and used them in payment of employes and other running expenses, in paying his creditors, and in the general operations of his business. It was held that the trust fund had lost its identity and could not be traced.

In the case at bar there is the same commingling as in the cited case. The Central Bank put the proceeds of the collection with its general funds, and used them in payment of its debts.

The Washington cases heretofore cited have denied the right to recover a trust fund because it was commingled with the funds of the trustee. Those hereinafter cited deny the right because there was no augmentation of the assets of the trustee. In *Rugger vs. Hammond,* 95 Wash., 85, 163 Pac., 408, the owners of bonds authorized their sale and the remittance of their proceeds to a designated bank. One of the owners instructed the bank to use his portion of the proceeds, when received, for a particular purpose. The bank did not do so, but so disposed of them that

they were lost to the owner. He sought to follow the money as a trust fund in the hands of the bank's receiver. Denying him that relief, these rules were stated by the Court: (1) In such a case, a question of title to property, not of debt, is involved, and the claimant cannot prevail unless he can trace his property into the possession of the receiver of the insolvent bank; (2) The burden of proof is upon the claimant, and "it must clearly and satisfactorily appear that his money or property sought to be recovered is actually, in its original or substituted form, in the hands of the successor of his trustee;" (3) There could not be a recovery without showing that the bank's assets were augmented by the reciept of the trust fund; (4) The fact that the money was deposited with the bank, and was mingled with its funds and used in the usual course of its banking business, was insufficient to establish an augmentation of its assets.

Next in order is *Zimmerli vs. Northern Bank,* 111 Wash., 624, 191 Pac., 788. There bonds secured by a mortgage on realty were executed to a trust company. It sold two of the bonds to plaintiff. Subsequently a purchaser of the realty paid the entire mortgage debt to the trust company, which thereupon satisfied the mortgage, but did not pay the amount of his bonds to plaintiff. The purchaser of the property and plaintiff were both depositors with the trust company, and the mortgage debt was paid by a check drawn upon the purchaser's account with the trust company. The trust company became insolvent, and

plaintiff sought to establish that the money paid in satisfaction of his bonds was a trust fund, and to recover it from the company's liquidator. It was held that there had been no augmentation of the bank's assets, and therefore there was no trust fund.

In *Spiroplos vs. Scandinavian-American Bank,* 116 Wash., 491, 199 Pac., 997, we have a case that cannot in any way be distinguished from the case at bar. On the 12th January, 1921, the plaintiff bought from the defendant bank a draft upon the National Bank of Greece. Neither the defendant nor its New York correspondent was a correspondent of the Greek bank, so to provide funds for the payment of the Greek draft, the defendant drew a draft for the same amount upon its New York correspondent in favor of the New York correspondent of the Greek bank. The money paid by the plaintiff for the Greek draft went into the defendant's general funds. Three days after the purchase of the draft, on the 15th, the bank commissioner (examiner) declared the defendant to be insolvent, and took charge of its affairs for liquidation purposes. When the draft was drawn, the defendant had a sufficient balance with its New York correspondent to pay the draft, but after it closed its doors the New York correspondent refused to pay the draft and applied the balance on claims it had against the defendant. The plaintiff thereupon sought to establish the money he paid for the draft to be a trust fund, and to recover it as such. It was held that he could not recover because there had been no

augmentation of the defendant's assets. Quoting from the opinion:

> "It may be assumed that Spiroplos' money passed into the hands of the receiver in a substituted form, but the more serious question is whether it increased the net assets of the bank. The receiving of money on deposit by a bank does not ordinarily swell its assets because it creates a debt of the bank to the depositor equal to the amount of the money so received. In the *Rugger* case it was said, speaking of the money there involved:
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> 'True this money in a sense went into the assets of the trust company, but so does all money which is deposited in a bank, since title thereto passes to the bank. It is not enough, however, for our present purpose that the money physically became a part of the trust company's assets, it must have actually swelled the net assets of the trust company and passed in some form to the hands of the receiver. Manifestly the receiving of money on deposit by a bank does not ordinarily swell its assets, for it creates a debt of the bank equal to the amount so received.'
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> The question then arises whether, when the bank received Spiroplos' money and issued the draft, it created an obligation on the bank equal to the amount of money so received. If it did, the rule of the cases just cited would control."

The Court then considered that question, and held that when the bank issued its draft it incurred a debt to plaintiff, and the "net assets of the bank were not augmented by the transaction."

The rule stated in the Spiroplos Case has been somewhat weakened by the opinion in the later case of *Raynor vs. Scandinavian-American Bank,* 22 Wash.

Dec., 46. The Spiroplos Case required that there should be an augmentation of the net assets of the bank. The Raynor Case held it was suffiicient if the gross assets were augmented. Both are department decisions, and at the time of writing this brief the Supreme Court, sitting *en banc,* has not harmonized them. In view of that situation, we shall not remark upon either, but shall pass to the Federal decisions.

In *City Bank vs. Blackmore* (C. C. A. 6th Circ.), 75 Fed., 771 (opinion by Judge Taft), the City Bank sent a New York draft for $5,000 to the Commercial Bank, for credit to the account of the City Bank. The Commercial Bank was then hopelessly insolvent, due to the dishonesty of its cashier and managing officer, and closed its doors three days later. Upon receipt of the draft the Commercial Bank sent it to the National Bank of the Republic, at New York, which credited the draft against a debt due it from the Commercial Bank. The City Bank sued to establish and recover the amount of the draft as a trust fund, asserting that a trust relation existed because of the hopeless insolvency of the Commercial Bank, known to its managing officer, when it received the draft. It was held that although a trust relation existed, there was no trust fund to be recovered unless it appeared that the assets of the Commercial Bank were increased $5,000 by the credit given it on the books of the National Bank of the Republic, or unless the claims against the Commercial Bank were decreased $5,000 by reason of the credit, so that there was $5,000 more for distribution among its creditors.

That, of course, did not appear. The Commercial Bank received $5,000, but incurred an indebtedness to the City Bank of the same amount. It used the $5,000 to pay a previously existing debt to the National Bank of the Republic. At the end of the transaction it was financially where it was at the beginning. Its assets had not been increased or its debts decreased by one dollar. The lessening of its debts to the National Bank of the Republic had been offset by a similar increase of its debt to the City Bank; in other words, there was merely a substitution of one creditor for another. It was therefore held the City Bank could not recover.

The similarity of the cited case to the case at bar is striking. The Central Bank received $48,000 in money and in doing so incurred an indebtedness exceeding that amount. It used the money so received to pay previously existing indebtedness, the result being that through the transaction it did not add one dollar to its assets or decrease its indebtedness by one dollar. Nothing more was accomplished than to pay one creditor by incurring an indebtedness to another.

In *Empire State Surety Co. vs. Carroll County* (C. C. A., 8th Circ.), 194 Fed., 593, many different questions concerning trust relations and trust funds were involved. Among other things, it was held that "the deposit of checks of third persons which are credited to the depositor and used by the bank to pay its debts bring no money into its fund of cash and form no

foundation for preferential payment to the depositor" —citing *City Bank vs. Blackmore, supra.*

In *Wuerpel vs. Commercial Bank* (C. C. A., 5th Circ.), 238 Fed., 269, a mercantile house assigned an account against a customer to a bank as collateral security for a debt owing to the bank. The customer paid the account to the mercantile house, which thereupon used the money in paying creditors other than the bank. The mercantile house becoming insolvent, the bank sought to establish and recover the amount of the account as a trust fund. It was held that there could be no recovery because the insolvent estate was not augmented by the fund sought to be recovered. Quoting from the Court's opinion (pp. 274, 277):

> "It is not claimed that the proceeds of the draft went into the purchase of new goods, but, on the contrary, that they went entirely to reduce existing obligations. That this was a benefit to the bankrupt is obvious. The test, however, is whether it was of interest to the general creditors, by swelling the fund or assets that came to the trustee for distribution among them. If new goods had been bought by the bankrupt with the proceeds of the draft, which went into its general stock, and presumably remained there till surrendered to the trustee, or if there had remained, at all times till bankruptcy intervened, a balance to the credit of the bankrupt, at any or all of the banks with which it did business, an amount in which the proceeds of the draft might be represented, an augmenting of the assets that came to the trustee would be shown. The stipulation and record affirmatively show that no such use was made of the proceeds of the draft, but that, on the contrary, they were used exclusively to pay existing obligations, and added

nothing to the property or money that went to the trustee in bankruptcy.

* * * * * *

The general doctrine that the estate in insolvency must have been augmented by the fund sought to be recovered is well settled, and seems not to be disputed. Its application to the facts of this case is the disputed question. The authorities cited are most in point upon the proper application of the rule to the facts shown by the records. Following them, we think that the record affirmatively shows that the insolvent estate, which was to be administered in bankruptcy for the benefit of the creditors of the bankrupt, did not profit from the proceeds of the converted draft in any respect, and that when this affirmatively appears the injured or defrauded party is no more than an unsecured creditor, entitled to no priority, since it is not the character of the wrong done him alone, but also the fact of advantage received by other creditors thereby, that entitles him to such priority."

In *Knauth vs. Knight,* 255 Fed., 677, an insolvent firm daily overdrew their account with a bank in large sums. These overdrafts were secured by pledged collaterals, and at the close of the day's business the firm would deposit enough money to cover the day's overdrafts. The money necessary for that purpose was obtained from plaintiffs (among others) by the issuance of fictitious bills of lading, which were attached as security to drafts which were discounted or sold. Plaintiffs elected to rescind the fraudulent transactions by which their money was obtained, and sought to follow as a trust fund the securities which the bank held as collateral for the overdrafts, and which, after the bank's claim had been satisfied, had

been turned over to the trustee in bankruptcy of the insolvent firm. On the plaintiffs' appeal from an adverse decision below it was said:

> "It is the theory of appellants that the money obtained from them went to reduce the indebtedness of the bank secured by the collaterals pledged, and therefore the bankrupt estate was to that extent enriched and a trust created in their favor on the said property. The District Court found against this contention, holding that while appellants' money went to pay an overdraft which was secured by a lien on the property pledged, and reduced the secured indebtedness of the bankrupts to the bank, it also had the effect of enabling the bankrupts to increase their indebtedness of like character and amount on the succeeding business day; therefore the estate was not enriched for the benefit of the general creditors. This holding was correct. It is evident the money went to pay pre-existing debts, and did not increase the free assets at all."

The rule stated in the above decisions is clear cut. A trust fund is only recoverable when it appears that the insolvent estate has been augmented by it. It must appear that the estate in which the insolvent's creditors will share has actually been enriched by receipt of the fund, and that they will receive so much the more because of it. If the trust money has not swollen the estate; if, at the time that actual insolvency occurred and the estate was taken over for the benefit of creditors, the estate was no greater than it would have been had not the trust money been received, it is not recoverable. Apply the rule to the case at bar. Through the collection of plaintiff's check the Central Bank received $47,000, but the money was immedi-

ately used in paying the Bank's debts, so that none remained in its hands when its doors were closed. Now, while the Bank's debts were reduced by $47,000 through this use of the money, yet the estate was not augmented, for it became liable to pay plaintiff the $47,000 which was used in paying other creditors. It is apparent that there was, as in *City Bank vs. Blackmore, supra,* a mere substitution of creditors, and that the assets of the Central Bank were not increased by one dollar through the transaction with plaintiff.

The questions considered and decided in the foregoing cases seem never to have been squarely presented to this Court. Its decisions, however, are in harmony with the cited cases, and forbid a recovery in this case. In *Titlow vs. McCormick,* 236 Fed., 209, a national bank on several different occasions received trust funds, which it deposited to its credit with other banks. The balances in its favor thus created were exhausted by checks drawn upon them in the regular course of business, save a small balance which remained with one of the depositaries. When the trustee bank closed its doors, it had money on hand and on deposit with reserve and other banks which far exceeded the amount of the trust funds. It was held that the *cestui que trust* was entitled to the small balance which remained with the one depositary, but that the remainder of her money had lost its identity by reason of its use in the trustee's business operations prior to the time it suspended payment. In *United States National Bank vs. City of Centralia,* 240 Fed., 93, it appeared that the bank had received

$50,000 of the city's money under such circumstances as to make the bank a trustee thereof. The bank deposited the money to its credit with a bank in Seattle. The Seattle bank applied $11,000 of the money upon an overdraft of the trustee bank, and used $12,000 in payment for some notes it had rediscounted and charged back to the trustee bank when they became due. The remainder of the money was transferred, upon the order of the trustee bank, to a bank in Tacoma, where it was either applied upon indebtedness of the trustee bank or paid out on drafts drawn by it. When the trustee bank suspended payment it had on hand considerably more money than the amount of the trust fund. This Court held that the trust fund had been dissipated, had lost its identity, through its use in the trustee's business, and that the city could not recover.

Those same conditions are present in this case. Before the Central Bank closed its doors, all the money received from the collections involved had been used to meet its business engagements, in payment of its drafts and general indebtedness. Why shall not the rule that prevailed in the cited cases prevail here? The fact that in those cases the trust funds were sought to be traced into the hands of the trustee bank's liquidator, while here the fund is sought to be traced into the hands of a bank with which it had been deposited, does not differentiate the cases. In cases of this character, the plaintiff does not sue to recover upon a debt, but to recover property, specific money, of which he claims ownership. *Rugger vs. Hammond,*

supra (95 Wash., 85), and cited cases. The money has always passed out of the trustee's hands, and the plaintiff cannot recover it unless he can identify and trace it, either in its original or a substituted form, into the hands of the person from whom he seeks recovery. *Titlow vs. McCormick, United States Bank vs. Centralia,* both *supra.* Usually that person is the trustee's assignee or receiver, but the principle governing the right of recovery is necessarily the same when recovery is sought from some other to whom the trustee is alleged to have entrusted the money. In neither case can the plaintiff recover unless he can identify his money in the defendant's hands. Now in the cited cases, this Court held that when a trust fund had been commingled with the trustee's funds, and had been used in the conduct of its business, paying its debts, etc., it lost its identity, and could be no farther traced. That occurred here. The Seattle National Bank sent a number of items, totalling over $51,000, to the Central Bank for collection. These items, together with a number of other items, amounting to over $7,000, which the Central Bank had received for collection from other sources, were bunched and put through the clearing house as a mass. While plaintiff's $47,000 check was the principal item, its right in the entire amount collected was no higher than the rights of the owners of the other items. Whatever loss or diversion occurred in the process of collection, it would necessarily share proportionately with the other owners. In making the collection through the clearing house, there were offset some

$9,000 in items drawn upon and payable by the Central Bank, so that it realized but $49,500 from the $58,000 collections it had. Of this sum, $1,500 was left on deposit with its clearing house correspondent, the Yakima Valley Bank, and $48,000 was sent to the Trust Company for credit to the account of the Central Bank. From this amount $27,000 was paid out on drafts drawn upon the Trust Company by the Central Bank; in other words, it was paid out on the Bank's order, in settlement of its every day business engagements. The remainder was used to balance a charge back of overdue rediscounted paper, this being authorized by the long standing arrangement between the two banks respecting rediscounts. Evidently no distinction can be made between the situation involved here and the situations appearing in the cited cases, especially in the United States Bank Case. We submit, therefore, that this case is ruled by them.

If we are right in the foregoing conclusion, the Court need not look beyond its own decisions. However, it will probably be claimed that the Central Bank was guilty of actual fraud in undertaking the collection of plaintiff's check, and that the Trust Company was cognizant of the fraud. The evidence furnishes not the slightest basis for such a claim, but if it were sustainable plaintiff would yet not be entitled to recover. The doctrine of augmentation of assets would still stand in the way, for if in receiving the money the Central Bank incurred an obligation of equal amount, if no more resulted than a substitution of one creditor for another, the assets

of the Central Bank not being increased nor its liabilities diminished by the transaction, there can be no recovery.

IV. *If all the preceding points are decided in plaintiff's favor, there was error in the amount awarded, plaintiff being entitled to no more than its proportion of the balance of the* $48,000 *remittance which remained in the hands of the Trust Company on the* 25*th.*

The Trust Company received the $48,000 remittance and gave the Central Bank credit for it on the 22d. The officers of the Trust Company were not informed of the source of the remittance or of the outstanding $51,000 draft until the 25th, when letters were received from Buckholtz telling of both. In the interim the Trust Company had paid $27,000 out of the remittance on drafts drawn upon it by the Central Bank. The District Judge refused to reduce the recovery by the amount of those payments, and gave plaintiff a decree for $45,000, that amount being arrived at by ascertaining the proportion which the amount of its check, $47,000, bore to the entire amount of the collection items, $51,000, sent by the Seattle National Bank to the Central Bank, and giving it a proportionate amount of the $48,000 derived from those items that the Central Bank had sent to the Trust Company.

If all the preceding points are held with plaintiff, yet there was manifest error in not reducing the

amount of its recovery by the amount of the drafts paid by the Trust Company before it was informed of the source of the $48,000 remittance. If the Trust Company did not know the remittance was a trust fund, but supposed it belonged to the Central Bank, it was certainly guilty of no wrong in paying out the money on the order (drafts) of the Bank. The situation is analogous to those which this Court considered in *Titlow vs. McCormick,* 236 Fed., 209, and *United States National Bank vs. Centralia,* 240 Fed., 93. There it was held that trust funds could not be followed which had been paid out upon checks or drafts drawn by the trustee bank upon the banks in which the money had been deposited.

The only possible justification for holding the Trust Company for the whole amount of the remittance, notwithstanding the payments it made therefrom on the drafts of the Central Bank, is to say that Buckholtz, though posing as an employe of the Bank, was in fact an employe of the Trust Company, put by it in the Bank to represent its interests; that by operation of law it is charged with knowledge of all that he knew; and that as he knew when the remittance was sent that it was a trust fund, which could not properly be used for any other purpose than to pay the $51,000 draft sent the Seattle National Bank, the Trust Company knew those things when it received the remittance. And that, we think, is the theory upon which the District Judge proceeded.

Any theory which is entitled to respectful considera-

tion must have a foundation of fact to rest on. This has none. The evidence is overwhelming that Buckholtz entirely severed his relations with the Trust Company when he went to Yakima, and that while he was in the Central Bank he was there solely as its employe. The bank examiner testified that in December he requested Barghoorn to put another man in Ellis' place, and that Barghoorn promised he would do so as soon as he could get a suitable man. (Trans., 63.) Barghoorn testified that in compliance with the examiner's request he looked around for a man to take Ellis' place; that he asked the officers of the Trust Company to recommend some one, and they recommended Buckholtz; that when he employed Buckholtz it was understood that if Buckholtz proved efficient he would take Ellis' place as soon as it could be done without making trouble; and that Buckholtz was employed absolutely as an employe of the Central Bank, and was paid by it. (Trans. 49-50.) Mr. Rutter and Mr. Triplett testified that Barghoorn came to them, saying that he desired to make a change in the management of the Central Bank, and requesting them to recommend some one for the place; that, among several others, they recommended Buckholtz; that at Barghoorn's request they sent Buckholtz to him, and were later told that they had agreed on terms; that when Buckholtz went to Yakima he quit the employ of the Trust Company, completely and absolutely, and during the time of his connection with the Central Bank he was in no way, shape, manner or form, an employe or agent of the Trust Company, with the

single exception that, under circumstances hereafter to be referred to, rediscounted paper was sent to him personally for attention at maturity instead of being entrusted to the Bank. (Trans., 121-122, 101-102.) All this is amply confirmed by Buckholtz, who testified that when Barghoorn employed him it was understood that he was eventually to succeed Ellis; that when he went to Yakima he completely severed his relations with the Trust Company, and entered the employ of the Central Bank; that Barghoorn told him that his principal duties at first would be with the credit department and looking after the rediscount dealings with the Trust Company; that after he got in the harness he found it very inconvenient to have the rediscounted paper in Spokane when it fell due, as the borrower would come in to pay, renew or reduce, or give security, and nothing could be done because the paper was not there; that he therefore arranged with Triplett to send the rediscounted notes as they approached maturity to him personally, in his individual capacity; that he was paid nothing by the Trust Company for handling such paper, it being for the benefit of the Central Bank as well as for the accommodation of the Trust Company; and that during the entire time of his connection with the Central Bank he was solely and entirely employed by it, and that he was in no way a representative of the Trust Company, save in the handling of rediscounted paper, as heretofore stated. (Trans., 126-128.)

Presumably Messrs. Rutter, Triplett and Buckholtz are gentlemen of integrity and high standing in the

community in which they live, else they would not occupy the positions they do. It is inconceivable that men of such stamp would deliberately perjure themselves concerning a matter in which they have no interest save such as attaches by reason of their being officers and employes of the Trust Company. But if it is imagined they would be willing to do so, what about Barghoorn? He ceased to be a director of the Trust Company in January, 1921. Doubtless he had a kindly feeling for the Trust Company while it was advancing money to keep the Central Bank going, but unless he differs from the generality of mankind, the feeling would not survive its refusal to pay the $51,000 draft. At any rate, he has not the slightest interest in this suit, and yet, if the theory under discussion is accepted, he perjured himself as deliberately and thoroughly as, to sustain the theory, it must be assumed that Messrs. Rutter, Triplett and Buckholtz did. Reason balks at the notion of such wholesale purposeless perjury.

But in this as in other instances the correspondence between Buckholtz and Messrs. Rutter and Triplett is the best evidence against the view accepted below. These letters were put in evidence by plaintiff. They were written when there was no occasion to distort or color, and unquestionably express the real sentiments of the writers. They permit no doubt that Buckholtz' position was precisely what the testimony describes it to have been: an employe of the Central Bank, working in its interest, and unhampered by any tie, save that of sentiment, to the Trust Com-

pany. The tone of the correspondence is not, of course, that which would be found in letters passing between mere acquaintenances, or between persons dealing at arm's length. There was a warm friendship between Buckholtz and the officers of the Trust Company, especially Triplett, between whom and Buckholtz nearly all the letters passed. Doubtless Buckholtz also had a sentimental regard for the Trust Company as an institution. It was his business Alma Mater. He had entered its service as a boy, and had worked for it all his life save on two occasions when it had offered him opportunities for service with smaller banks, where promotion might be more rapid. Moreover, he knew that Barghoorn, his employer, was not dealing at arm's length with the Trust Company. Barghoorn had been a director of the Trust Company for 13 years, not severing that connection until the middle of January, 1921. He was depending almost entirely on the Trust Company for assistance through the financial depression, and it behooved him to deal most frankly and fairly with it. It was much dissatisfied with the manner in which Ellis had handled the rediscounts, and one of Barghoorn's incentives in employing Buckholtz was to get a man in charge of the redisocunts who knew the kind of paper that would be acceptable to the Trust Company, and who would handle the rediscounts in a manner satisfactory to it. (Trans., 49.) Such being the relation between Barghoorn, the head of the Central Bank, and the Trust Company, there was no reason why Buckholtz should not follow his natural inclination and

write to the officers of the Trust Company with the utmost frankness, and in the vein of friendliness which their former and present relations made natural.

The weight of these letters as evidence cannot be properly appreciated unless they are read in their entirety. However, excerpts from them will give some notion of their character, and show the desirability of carefully considering them as a whole. After reading them doubt cannot be entertained that, however friendly the relations between the writers and between the two banks, there were distinctly two parties to the transactions involved: the Central Bank and the Trust Company; that Buckholtz represented the one just as certainly and definitely as Messrs. Rutter and Triplett represented the other; and that on both sides, the one as much as the other, the respective banks were faithfully represented by their representatives, albeit with a decent regard, each for the rights of the other, and without desire to overreach or impose upon. The very first letters that passed fairly indicate the positions and spirit of the writers. Writing Triplett on the 6th January, Buckholtz sent him a note for $11,000, concerning the liquid character of which both he and Triplett evidently knew something, and of which they entertained doubts. Buckholtz said: "Don't swear but I want you to take this over and credit account of this bank if you can get it through." There followed a statement of a number of reasons, from Buckholtz' standpoint, why the Trust Company should accept the note and credit its amount to the Central Bank, and the

letter concluded with "I hope you will plug your darndest on this." (Trans., 142-143.) Under date of the 8th Triplett replied, saying that "I did my darndest to get it over for you," but that the excutive committee would have none of the note. "They feel that you have other paper down there which is more liquid, and which comes nearer measuring up to our standards. We have great confidence in your ability to pick out the kind of notes we want, and will ask that you work along those lines instead of asking us to take the Franc note." (Trans., 145-146.)

On the 8th Triplett wrote Buckholtz concerning a number of drafts, drawn against shipments of apples in transit, for which the Central Bank had been given credit, and which had remained unpaid for so long that the Trust Company desired something done about them, at the same time saying that one of them had been charged back to the Bank. (Trans., 147.) Replying, Buckholtz told of things he had in prospect to reduce the amount of the long standing apple drafts, saying that "If you can possibly carry this a week or ten days longer, I sure will appreciate it," and that "You might mention to Mr. Rutter that your risk on the apple drafts in transit is not bad, not nearly as bad as it might be." (Trans., 149-151.)

It will be recalled that it was desired, for the benefit of both parties, that as any pledged or rediscounted paper approached maturity it should be sent to Yakima, so there would need be no delay in its payment, reduction or renewal, or the giving of security there-

for, and that after Buckholtz went to Yakima it was arranged that such paper should be sent to him personally, and that he should be personally responsible therefor. Writing to Triplett under date of the 21st concerning the difficulty the Central Bank was having to maintain its cash reserve, he suggested as one way out of the difficulty that as "collections are made on notes hypothecated, to keep the money here and give you something else," although he at the same time recognized that "the collateral will in this way become more and more of an undesirable nature, but I will keep it in as good shape as it is possible to do." He closed by saying that "unless you insist, we will continue to hold what few pennies we might collect on your collateral notes and substitute other stuff, which I trust you will O. K. for the present." (Trans., 220-222.) Triplett flatly declined to permit that to be done, saying that "Your method of handling the collateral notes, while satisfactory from your standpoint, is not so satisfactory to us, for the reason that our collateral will keep getting more and more shoddy as time goes on." The remainder of the letter was taken up with what the Trust Company was willing to do to help out the cash reserve situation, the tenor of which was that while the Trust Company's feeling was "the most friendly in the world," and it was willing to assist the Central Bank to any reasonable extent as long as the security was reasonably good, it did not purpose getting into a situation where it would have to sustain a loss. (Trans., 224-226.)

On the 23d Buckholtz wrote a very long letter to Mr. Rutter, going into the condition of the Central Bank very thoroughly and stating his various plans for relieving the cash reserve situation and ultimately paying off its indebtedness. If these failed he saw only one other "avenue of relief:" to "whip up some of the stuff you are holding as collateral into rediscounts and substitute a poorer class of security." He requested Mr. Rutter to "write me a letter stating whether or not you will back the institution and myself any further in case of necessity." He dilated upon the advantageous location and the future business and earning power of the Central Bank, and declared that "there is no doubt in my mind" but that if the present difficulties were surmounted the Bank it was his "positive opinion" that if the Trust Company and become "a valuable account." He returned to the subject in a postscript to the letter, saying that it was his "positive opinion" that if the Trust Company would continue its assistance, advancing such further requirements as might be needed, which would probably not exceed $50,000, it would get its money back much more quickly than it would if it permitted the Bank to close. (Trans., 229-232.) On the next day he wrote Triplett, referring to the Rutter letter, and again requesting an expression concerning "how the S. & E. feels about things here and whether we can expect you to honor our drafts if the overdraft should go up to $25,000 or a little more." Expressing his worry over conditions and his inability to take things as easily as some people, he said that he might

feel more at ease "depending more or less on the strength of your letters and Mr. Rutter's that you would back me up. You have taken on everything I have sent for rediscount it is true, but I haven't the nerve to send you any junk for that purpose and the overdraft keeps wearing and the paralytic circumstances here ride on me. The suspense is awful." (Trans., 232-234.)

The sincerity of these letters is manifest. There was no occasion for them to be otherwise. They permit no doubt that Buckholtz was solely and entirely an employe of the Central Bank, devoting himself wholeheartedly to its service, and under no other obligation to the Trust Company than such as arose from benefits received in the past and, probably, anticipation of future benefits which might result from a continuance of friendly relations with it. If Buckholtz was in the Central Bank merely as an employe of the Trust Company, his only purpose in being there to see that for every dollar it advanced the Bank it received paper of equal amount and unquestionable value, why should he have felt any concern over the affairs of the Bank? Why should he have been so anxious to know whether the Trust Company would "back the institution and myself any further in case of necessity?" Why should he have so strongly urged upon it the desirability of continuing to assist the Bank, although in so doing it might be required to advance $50,000 or more additional and take "a poorer class of security?" Why should he have felt that "The suspense is awful" while waiting to hear from

Messrs. Rutter and Triplett whether the S & E would "back me up?" Why should he, during the entire time of his connection with the Central Bank, have been interceding in its behalf with the Trust Company; now endeavoring to persuade the latter to accept the $11,000 Franc note, now asking it to carry the long standing apple drafts as a credit for a while longer, now urging it to let the Bank retain the money collected on the rediscounted or hypothecated notes and put other notes in its stead? There can be but one answer to these questions. Buckholtz had no connection with the Trust Company but was solely an employe of the Bank. As soon as the critical period was past he expected to succeed Ellis as cashier and manager of the Bank, a much better position than he had held with the Trust Company. It was natural that he should be interested in the Trust Company continuing its assistance and carrying the Bank over the critical period, wherefore his exertions to bring that result about.

Another feature of the Buckholtz letters is equally convincing, making it clear that Buckholtz expected to remain with the Central Bank and become its head, provided a sale was not made, in which event he assumed that Ellis would retain his position. This feature is the interest he took in the management of the Bank, his criticisms of it and plans for betterment. In a gossippy letter to Triplett on the 10th, written as soon as he had had an opportunity to size up conditions, he spoke severely of the slovenly manner in which the work was done. The staff, he thought, was

too large, and with one or two exceptions was inefficient. "I would like to fire the whole gang out of here and get new people, all except Lemon and the old maid," but "it would not be wise to make any changes just now of course and we will have to poke along." If a sale did not go through, so that he remained there, "I am going to relieve one employe or give him notice to get another job. Haven't decided on who it will be. In fact, if business doesn't pick up and deposits remain below $500,000 we could weed out two of them if the others would spruce up a little." The business had been mismanaged, various particulars being pointed out, but its future was promising. "The force could be cut down somewhat and the institution would make very good profits even if deposits remained at $500,000, or less, in less than two years it would earn enuf to charge off everything slow." He concluded by saying that "there's no use crying about spilt milk; there is lots of it spilt and we have to mop it up the best we can." (Trans., 152-154.) Equally significant is a letter written to Triplett on the 18th, in which Buckholtz told of a heart to heart talk that he had had with Ellis. It seems that a construction company which owed some overdue notes to the Bank expected to receive a good sized payment on its work. Barghoorn knew it was expected, and told Ellis and Buckholtz to see that the Bank got some of it. The payment came in, but Ellis, whom Buckholtz had asked to fix up the matter, permitted the company to keep the money and renew its notes without reduction. This moved Buckholtz,

as he told Triplett, "to have a confidential talk with Ellis" and ascertain "how seriously he took my presence and position." The talk became somewhat heated, Buckholtz charging that Ellis "deliberately did the opposite of the policy and plans I had layed out to his knowledge and even at the request of Mr. Barghoorn" and that he (Buckholtz) wanted to know whether Ellis "was going to take my plans and policies seriously or not, and if he wasn't I wanted to know it right away." The conclusion of the discussion was that "we both agreed that it was desirable that he stay on the job for effect," Buckholtz adding that he hoped the proposed sale would go through, that he wished Ellis, whom he understood was to remain under the proposed new management, and the Bank every success in the world, but that in the meantime "there was no sense in the bank paying my salary and heavy expense if he was going to pull any more stunts over me like this one." (Trans., 184-191.) It is idle to say that Buckholtz would have taken such interest in the internal affairs of the Central Bank, and have been planning for changes and improvements in its affairs in the future, if he had been there merely as an employe of the Trust Company, not otherwise concerned with the Bank than to see that the Trust Company got ample security for every dollar it advanced to the Bank.

Another significant feature of these letters is that throughout Buckholtz unvaryingly and completely identifies himself with the Central Bank, and speaks of the Trust Company as an entirely independent third

party with whom he, as representative of the Bank, is dealing. The same feature will be observed in Triplett's letters, Buckholtz being invariably identified with the Bank and spoken of as its representative in all its transactions with the Trust Company. Omitting as far as possible letters which have been referred to in other connections, the following are some of the illustrations of such identification. Buckholtz, on the 7th: "Our O. D. with you increased about $1000 at this end today." (Trans. 145.) Triplett, the 10th: "Your account has been charged $329.89 to cover the discount" etc. (Trans., 151.) Buckholtz, 10th: "We had a nice day today with a gain of $13,000 in deposits * * *. The S & E account hasn't been reconciled for December * * * We don't know how we stand * * *. We should have a credit balance." (Trans., 156-157.) Buckholtz, 11th: "Kindly charge our account with the L. W. Adams $400 rediscount * * * we are crediting your account with $329.89. * * * Our remittance to you again was good and taking in consideration the float of our drafts, we should have a credit balance." (Trans., 159.) Buckholtz, 14th: "Please send us statement of our account with you with vouchers up to date." (Trans., 171.) Triplett, 19th: "Day after tomorrow your account will be charged with the six Associated Fruit Company drafts which have been outstanding for so long." (Trans., 192.) Buckholtz, 19th (writing concerning the Franc Inv. note for $11,000 which the Trust Company refused to take, but which, according to the records of the Bank, was

still in the possession of the Trust Company): "To confirm our records, kindly write us acknowledging receipt, or send collection receipt." (Trans., 194.) Triplett, 20th (replying to above): "We are holding the $11,000 note here for safe keeping for your account, and as some little protection to your overdraft." (Trans., 203.) Buckholtz, 19th (enclosing notes for rediscount): "I hope you can get this on the books without delay as we will need it to meet that $17,700 draft which will likely reach you Friday." (Trans., 197-198.) Triplett, 21st: "We are charging your account today as follows * * *. These have been entered for collection and will be credited to your account when and as paid." (Trans., 210.) Buckholtz, 21st: "Mr. Rutter has written me that we can expect no increase in deposits * * *. This theory is our only possible chance to liquidate our borrowed money * * *. It would naturally help our reserve * * *. I hope to gradually work down our rediscounts * * *. Our deposits for the last day or so have held their own quite well * * *. We will continue to hold what few pennies we might collect on your collateral notes." (Trans., 219-222.) Buckholtz, 23d: "It is reasonable to expect our deposits will remain above $400,000; in fact, we have hopes that they will hold up pretty well to where they are * * * say we drop to $400,000 during the next two weeks, with collections on stuff in our pouch here of perhaps $10,000, it will hit our reserve to the extent of $20,000 more * * *. We of course hope it will not be that bad * * *. More than $5,000 of

notes in our pouch here * * *. We being fortunate not to have a great lot of hay loans * * *. Confident of cutting down our borrowed money * * * We mailed a $51,000 draft drawn on you * * * and no doubt we will have a few dollars there to meet it * * *. If you do not pay it, we are gone * * *. We still have hope of a sale." (Trans., 228-232.) Buckholtz, 24th: "I cannot figure out any chance of keeping the balance in our favor outside of the methods outlined * * *. Whether we can expect you to honor our drafts * * *. I had hoped * * * would keep our overdraft covered * * *. That bunch of E. S. Small drafts * * * has put an awful crimp into us * * *. I don't know what we are going to do, unless the S & E will carry the institution thru * * *. We collected about $1,700—$1,000 of which went on your rediscounts." (Trans., 232-234.)

The foregoing excerpts are by no means all the expressions of that character which are to be found in the correspondence. They are taken haphazard therefrom to show its uniform tone. They suffice, we are confident, to prove that Buckholtz was not an employe of the Trust Company during the time he was connected with the Central Bank. These were not formal letters passing between two corporations, in which the writers submerge their personalities in the corporate entities. In each of them the individual spoke, and his personality was the more conspicuous because of the friendly terms upon which the writers were. If Buckholtz had been in the Bank as an em-

ploye of the Trust Company, concerned only with getting for it ample security for the money it advanced, and having no interest in the affairs and fate of the Bank, the letters could not have been expressed as they were. If he was not an employe of the Bank, and his allegiance was to the Trust Company, it is evident that in writing to the Trust Company of the affairs of the Bank there would have been a tone of detachment in speaking of them; instead of identifying himself with it and speaking as a part of it, he would have referred to it as a third party; his tone, in short, would have been that he was identified with the Trust Company, and that he was acting for it in its transactions with a stranger, the Central Bank. It is evident, also, that if the officers of the Trust Company had put him in the Bank to represent the interests of the Trust Company, and knew that his allegiance was to it, they would in their letters have identified him with it; would have spoken of what he was doing as being done for it, and of him as acting for it in his dealings with the Bank. There is no need to remark upon the hostility to such a notion of the tone of their letters as well as his.

We have these further suggestions to make in closing the subject of the letters, taking for their text the first letters and the last that passed between Buckholtz and the officers of the Trust Company. If Buckholtz had gone to the Central Bank as a representative of the Trust Company, employed by it to protect its interest and lay hold of the best security available, would he in his very first letter have asked

it to accept the $11,000 Franc Inv. note, which he knew, and knew the officers of the Trust Company knew, was not gilt-edged security? Would he have asked Triplett, as a personal favor to him, to try to have the note accepted, saying "I am doing this on my own initiative—not at the request or suggestion of S. B. (Sikko Barghoorn) or any one else, and I hope you will plug your darndest on this?" (Trans., 143.) Would the executive committee of the Trust Company, in declining to accept the note because they felt that the Central Bank had a better class of paper, have replied to their employe, whom they had put in the Bank to get the very best security to be had for the advances they were making, in such soft language as this: "We have great confidence in your ability to pick out the kind of notes we want, and will ask that you work along those lines instead of asking us to take the Franc note;"? (Trans., 146.) Would they not rather have asked why it was that he, their representative, had changed sides, and in the interest of the Central Bank was endeavoring to get them to accept paper which he knew to be undesirable? Go down to the last letters, those written on the 21st, 23d, and 24th. If Buckholtz was a representative of the Trust Company, why was it that he asked its officers to permit the Central Bank to retain the money collected on paper belonging to the Trust Company and give a poorer class of paper in its stead? Why was it he urged them to advance such further money as the Bank might require, running up to $50,00 or more, and take paper which he knew to be undesir-

able, if not doubtful? Why did he so strongly press upon them the advantageous location of the Central Bank, its brilliant future under proper management, and the valuable account that it would be if present difficulties were surmounted? Why was he so anxious to know whether the Trust Company would "back the institution and myself any further in case of necessity," and say that "The suspense is awful" while he was waiting its decision? (Trans., 231.) Turning to the other side, if Buckholtz was a stranger to the Central Bank, put there by the Trust Company to serve its ends, why did Triplett reply to his request that the Bank he permitted to keep the money collected on the Trust Company's paper and put other paper in its stead that "Your method of handling the collateral notes, while satisfactory from your standpoint, is not so satisfactory to us, for the reason that our collateral will keep getting more and more shoddy as time goes on?" According to the theory that prevailed below, Buckholtz was put in the Bank as an employe of the Trust Company, his employment being to get money for his employer and save it from loss at whatever cost to others. The employe made a proposition to his employer which involved the employer giving up money which had been collected for it and accepting a possible loss by taking doubtful collateral, for no other purpose than to benefit the Central Bank. And yet the employer made no other response to the employe than that while the proposition was satisfactory from *"your standpoint"* it was not satisfactory *"to us."* Why, pray, this difference in standpoints?

Why was it permissible for the employe to have a standpoint while engaged upon his employer's business which was perfectly satisfactory to him although eminently unsatisfactory to his employer? And why was it that the employer had no reprimand, no criticism, even, for the employe's adoption of a standpoint which was satisfactory to him although detrimental to his employer's interests? These, and other similar suggestions that might be made if space permitted, emphasize the impossibility of believing Buckholtz to have been an employe of the Trust Company during the time he was connected with the Central Bank.

In opposition to the positive testimony and the evidence of these letters what is there? Nothing but several circumstances, innocent on their face and requiring the aid of suspicion to give them a sinister aspect, and which are readily explainable. These circumstances are:

(a) That Buckholtz left the Trust Company to go to the Central Bank, and that as soon as the latter closed its doors he returned to the service of the former.

That had occurred before. Buckholtz is a young man, 28 at the time of the trial, and anxious to get on in the world. On two previous occasions he had left the service of the Trust Company for smaller banks, where promotion would be more rapid. Once he went to a bank in Idaho, where he remained for two years; another time to a bank in Oregon, where he remained for several months. On both occasions

he was taken back by the Trust Company as soon as he wished it. (Trans., 104, 125.) In the present case, the officers of the Trust Company had no desire to part with him. Barghoorn, one of their directors, told them that he must get another man as head of his Yakima bank, and asked them, as a favor, to recommend some one whom they believed to be fitted for the place. In recommending Buckholtz they were actuated by two motives: a desire to accommodate Barghoorn and to benefit Buckholtz, for they believed they were putting him in the way of a better employment than he could hope for, at least for years, if he remained with the Trust Company. (Trans., 50, 101, 126.) There was nothing unnatural or suspicious in their taking him back when the Central Bank closed. They would have been a poor lot if they had not done so. When the proposal that he go to Yakima was made Buckholtz, and he was informed that it originated with the officers of the Trust Company, he was hurt, thinking their motive was to get rid of him. It was only the assurances of their esteem, and that they had recommended him because they believed that it would be much to his advantage if he took the position, that influenced him to go. (Trans., 126.) Their own self respect, if any other consideration were wanting, would cause them to take him back when the hopes they had built up in him were dashed by the failure of the Central Bank. But there was also the consideration of interest to induce his re-employment. The failure of the Central Bank left the Trust Company with $185,000 to $190,000 of Yakima paper

on its hands and with no local institution or man to look after its interests. The times were troublous, and if this paper were not looked after closely by some interested person, who knew something of local conditions, there might well be a heavy loss on it. During his month's work in the Central Bank Buckholtz had obtained a fair conception of local conditions, and had familiarized himself particularly with this particular paper. Much of it had been recommended by him, and in running through his letters it will be observed that he had exerted himself to secure information concerning the resources and character of its makers. Knowing this, as soon as the Bank closed the Trust Company employed him to look after the mass of Yakima paper it held, remaining in Yakima for that purpose. (Trans., 103, 104.) The re-employment was perfectly natural, whether regarded from the standpoint of decent treatment of Buckholtz or of the Trust Company's self interest.

(b) That while Buckholtz was with the Central Bank paper pledged or rediscounted with the Trust Company was sent to him personally for collection or other attention.

That was in the interest of the Central Bank as much as of the Trust Company. Under the arrangement between the two banks, if the rediscounted paper was not paid or otherwise settled in a satisfactory manner at maturity it was charged back to the Bank. To permit the paper to go at loose ends, without prompt attention at its maturity, would have meant

that the Bank would be constantly hustling to get new paper forward to the Trust Company to take the place of that which had been charged back, or that its account would be continually and heavily overdrawn, a practice which, although considerable lenity in that respect had been shown the bank, was distasteful to the Trust Company, and which its executive committee had ordered to be discontinued. (Trans., 113.) It was of the utmost importance to the Bank, too, that its transactions with the Trust Company should be attended with as little friction and trouble as possible, and that the notes which it had pledged to or rediscounted with the Trust Company should either be paid at maturity or some settlement made which was satisfactory to it. The Bank was making heavy demands upon the Trust Company, and while the latter had shown a very accommodating disposition, it is self-evident that that spirit would not have long survived if the Trust Company were given much trouble with the collection or other satisfactory settlement of the paper it held. One of the causes for complaint against Ellis was the unsatisfactory manner in which he handled the rediscounting with the Trust Company, and it was partly in order to remove that difficulty that Barghoorn employed Buckholtz. (Trans., 48-49.) To accomplish one of the purposes of his employment, Buckholtz proposed to the Trust Company that as paper pledged to or rediscounted with it approached maturity, it should be sent to him, and that he would be personally responsible for it and give it the necessary attention to secure prompt

settlement. This, he says, was as much in the interest of the Central Bank as of the Trust Company, and it is manifest that it was. (Trans., 127.) He received no compensation from the Trust Company for what he did in that behalf, and it sent the paper to him because of his suggestion that it would be for the mutual benefit of the two banks, and because of its acquaintance with him it was willing to entrust the paper to him. (Trans., 103.)

(c) That on the day before the Central Bank closed, Buckholtz took away from the Bank a number of notes which he claimed belonged to the Trust Company, and which he refused to surrender to the examiner when the latter took possession.

Buckholtz permitted the examiner to examine the notes, and the latter testified that with the exception of one or two items which were taken by mistake the notes belonged to the Trust Company. (Trans., 59.) These had been entrusted to Buckholtz personally under the arrangement referred to above, they belonged to the Trust Company and neither the Bank nor the examiner had any right to them, and Buckholtz would have betrayed the trust confided to him had he not, when it seemed that the Bank must close, taken into his own custody the paper which had been entrusted to him personally, so that the title to and right of possession of it should not come in question because of the examiner seizing it.

(d) That on two occasions, once before the Bank closed and once just after, Buckholtz gave to a stran-

ger with whom he was conversing a business card which showed him to be connected with the Trust Company, and on one occasion his conversation indicated that he was so connected.

So far as the cards are concerned, the strangers had difficulty (not unnaturally) in getting his name, so he gave them cards. He had no other cards than the business cards he had while he was with the Trust Company, so used those. (Trans., 130.) So far as concerns the conversation, it was with an officer of one of the Yakima banks (Louden), who says that whatever was said about the Trust Company was merely by way of introduction. (Trans., 80.) Buckholtz testified that he went in to get Louden's ideas about crop movement and general conditions in Yakima, and introduced himself by saying he was over with the Central Bank, whereupon Louden said that he had heard some one was there from the Trust Company and inquired if Buckholtz were he, to which Buckholtz replied in the affirmative. (Trans., 129.) These incidents are so trivial as scarcely to merit remark. On the occasions that he gave the cards he was engaged in general conversation, to which it was utterly immaterial whether he was connected with the Central Bank or the Trust Company. He gave the cards to fix his name, not to identify himself with any institution, and it was perfectly natural that under such conditions he would use his old business cards when he had no other. As to the conversation, in introducing one's self to a stranger for the bare purposes of a short chat about local business conditions, one does

not usually consider it necessary to be minute and explicit about the details of one's history. A few words, just enough to show that one is warranted in taking up the brief time required for the conversation, is generally regarded as sufficient. When Buckholtz said that he came from the Trust Company and was over with the Central Bank he told the exact truth. But as he did not consider it necessary to go into details and explain that he had severed his connection with the Trust Company, and was with the Central Bank as an employe, Louden, assisted in reaching his conclusion by the card which was handed him, assumed that Buckholtz was still an employe of the Trust Company and was at the Central Bank on its business.

(e) That the letters which passed between Buckholtz and the officers of the Central Bank were very intimate in tone, and showed that Buckholtz relied considerably upon their advice and assistance.

It would have been very surprising had the tone been otherwise. Buckholtz was a young man, 27 or 28. Triplett and he were intimate friends and he had a high regard for Mr. Rutter, as the latter had for him. Practically his whole business life had been under the tutelage of those two men. He had entered upon a task in which they were interested through their friendship for him, their friendship for Barghoorn, and their natural desire that the institution they were assisting should pull through. As Buckholtz got deeper into his task he found it a difficult one. There had been mismanagement, the securities were not liquid,

Ellis, still the active head of the Bank, would not co-operate with him. In a time of falling prices, tight money and shrinking bank deposits, these made his task hard. There was no one in Yakima with whom he could talk. Barghoorn was in Yakima but three times in January; when he took Buckholtz over to install him, two or three days during the middle of the month, and on the 26th, when he went over to endeavor to save the Bank. In the intervals he was not in Spokane all the time; he made "some trips" out of there; he recalled one into Idaho and one to Colville, their duration not stated. (Trans., 51.) Buckholtz naturally turned, therefore, to his former superiors, for both his personal and business relations with them were such that he could speak freely of his troubles and solicit the advice and consolation that he desired. It is evident, too, that he was a bit homesick. He was alone in Yakima, living in a hotel, and without acquaintances save such business acquaintances as he had made in his short stay there. He spoke a number of times of working alone in the Bank until 11 and 12 o'clock at night. Under the conditions surrounding him, it would be strange if a young fellow of his age did not feel the need to write to and receive letters from his friends in order to keep up his spirits. His craving for friendly companionship, albeit through the medium of letters, is evidenced by the long letters he wrote in which he spoke in detail of all his doings, business and personal. It is evidenced, too, by his entreaties to Triplett to write him. "Keep writing me. I like to hear from headquarters."

(Trans., 151.) "Keep writing me. It's great to hear from home. It strengthens my morale and it is indeed a pleasure to pause for a moment thru the day and open and read them. I am going to use you all I can in this work, and knowing that you have plenty of other matters to look after, I appreciate the time you give me." (Trans., 170-171.) "I look forward to your letters as the event of the day and any encouragement and assistance or suggestions help a lot right at this time." (Trans., 237.) Those phrases are sufficient explanation of the tone and matter of the general correspondence.

Considered singly or collectively, the foregoing circumstances do not rise to the level of evidence. If they stood alone, unaffected by any other evidence, they would not be accepted as evidence that Buckholtz was in the employ of the Trust Company while he was in the Central Bank. They lead to no definite conclusion, and are on their face so susceptible of several interpretations, as to forbid that they should be accounted evidence of the particular fact to which they are adduced. It is too much to ask that they should be accepted as sufficient evidence to establish that four reputable gentlemen deliberately committed perjury, and to overcome the convincing evidence of the letters.

We pray that the judgment appealed from be reversed and the cause remanded with directions for dismissal. In the event that it is held that the Trust Company is not entitled to this complete relief, we pray

that the cause may be remanded with directions to ascertain the amount of money that had been paid out on drafts drawn by the Central Bank on the Trust Company prior to the receipt of the Buckholtz letters telling of the outstanding draft for $51,000, and that a decree be entered for only the amount remaining in the hands of the Trust Company after payment of such drafts.

Respectfully submitted,

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Solicitors for Appellant,

Spokane & Eastern Trust Company.

No. 3983

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SPOKANE & EASTERN TRUST COMPANY (a corporation),

Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLEE

Upon Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

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BRIEF FOR APPELLEE

Upon Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Statement of the Case.

1. Introduction.

We shall follow the example of the appellant in the designation of the parties and shall likewise use round figures except when it is material to state the exact sum.

This action was instituted by the plaintiff, who is the appellee herein, United States Steel Products Company, a corporation of the State of New Jersey, to recover from the Spokane & Eastern Trust Company, a corporation of the State of Washington,

proceeds of a certain check belonging to the plaintiff. Central Bank & Trust Company, a banking corporation of the State of Washington, situated at Yakima and E. L. Farnsworth as Director of Taxation and Examination of the State of Washington, were also made defendants. The Central Bank was made a party defendant because of its trust relationship with plaintiff and its violation thereof.

E. L. Farnsworth, as Director of Taxation and Examination was made a party defendant because he was liquidating the Central Bank as an insolvent bank and under the statutes of the State of Washington was exercising the functions of a receiver (Session Laws of 1917, Chapter 80, Secs. 59 et. seq. p. 300; especially Sec. 62, p. 301 and Sec. 69, p. 304; Session Laws of 1919, p. 727; Session Laws of 1921, Chapter 7, Sec. 135, p. 68; Secs. 51, 52, 53, 54 and following sections; Session Laws of 1917, Chapter 80, Sec. 69, p. 304). Therefore, we shall hereafter refer to him as "receiver".

We call the Court's attention at the outset to the two following facts: (a) The plaintiff is not attempting to trace its property into the hands of the receiver of the insolvent bank. The claim as stated in the complaint and established by the evidence is that the proceeds of plaintiff's check did *not* come into the hands of the receiver. They were transmitted by the Central Bank at Yakima, to the Trust Company at Spokane, before the receiver took possession of the Central Bank. That this is the

theory of the plaintiff's case is shown by paragraphs V, VI, VII and VIII of the complaint (Trans. 4-7). (b) The receiver has not appealed from the judgment. Whatever effect the judgment may have upon him as a representative of the general creditors of the Central Bank, he accepts. He is not only contented and satisfied, but we have no doubt, gratified.

These facts eliminate from the case all questions which might be raised by the receiver as the representative of general creditors, e. g., the question of whether the proceeds of plaintiff's check augmented the assets in the hands of the receiver. In short, the judgment stands unchallenged either by the Central Bank or by the receiver. We call the Court's attention to these facts at the threshold because, if kept in mind, they will greatly simplify the future discussion of the case.

2. The Admitted Facts.

A consecutive statement of the undisputed facts is requisite and necessary to a ready comprehension of the evidence relevant to the disputed questions of fact and should also facilitate the discussion and application of the legal principles involved.

Shortly prior to the 19th day of January, 1921, the Yakima Hardware Company, in payment of an indebtedness then owing by it to the plaintiff, United States Steel Products Company, mailed from

Yakima to the plaintiff's office at Seattle, its check for forty-seven thousand, nine hundred twenty-eight dollars and seventy-four cents ($47,928.74). We shall hereafter state this amount as $48,000. The plaintiff was at that time a customer and depositor of the Seattle National Bank at Seattle, and on the 19th day of January, 1921, it endorsed this check to the order of the Seattle National Bank and delivered the same to that Bank for collection and deposit to the credit of the plaintiff. The Seattle National Bank thereupon undertook the collection of the check for the account of the plaintiff. There was printed upon the face of the deposit slip upon which the deposit was entered, the following:

> "In receiving checks or other items on deposit payable elsewhere than in Seattle, this Bank assumes no responsibility for the failure of any of its direct or indirect collecting agents, and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these conditions, items previously credited may be charged back to the depositor's account." (Par. III of Complaint, Tr. 2. Testimony, Townsan and Bray, Tr. 32).

Upon receipt of the check by the Seattle National Bank, it forwarded the same by mail for collection *and immediate returns* to the defendant Central Bank at Yakima. The check was not sent for credit. The letter of the Seattle National Bank transmitting the check to the Central Bank stated "We enclose for *returns* the following *cash items*" (Italics are ours). There were enclosed in the remittance

letter other items for collection which brought the total of the items so transmitted to fifty-one thousand, one hundred eighty-eight dollars and four cents ($51,188.04). (We shall hereafter state this amount as $50,000.) (See Par. IV of the Complaint, Tr. 3. Testimony, Miner, Tr. 33).

Not only was the check not remitted for credit, but the amount of the items so remitted was not charged by the Seattle National Bank to the Central Bank (See testimony of Miner, Tr. 34). Nor did the Central Bank credit upon its books the Seattle National Bank with the amount of the remittance. It was treated as a cash transaction (Testimony, of Lemon, Tr. 81). No relation of debtor or creditor arose. The check was received by the Central Bank some time before the morning of the 21st of January, presumably on the 20th of January too late to be presented (Testimony of Lemon, Tr. 35).

The Central Bank was not a member of the clearing house, but cleared through the Yakima Valley Bank, which was a member and acted as the clearing agent of the Central Bank. The check was presented through the clearing house to the Yakima Trust Company upon which it was drawn, and paid on January 21st.

There was presented through the clearing house at the same time the various other small items on various Yakima banks which had been remitted by the Seattle National Bank to the Central Bank for collection, and which went to make up the total

amount of the items of the remittance letter to $50,000. There were also presented through the clearing house in the same letter, various items held by the Central Bank against other banks in Yakima, aggregating approximately $7800. These items were checks which were drawn locally on local banks (Testimony of Lemon, Tr. 37). This brought the sum total of the items presented by the Central Bank to approximately $59,000.

There were presented at the same time through the clearing house, items against the Central Bank aggregating approximately $9,000, which were allowed. The balance in favor of the Central Bank was approximately $50,000.

In partial settlement of this balance, the Yakima Valley Bank, which had made the collections for the Central Bank as its agent, paid over to the Central Bank the sum of $48,000, retaining a small amount on deposit to the credit of the Central Bank (Testimony of Lemon, Tr. 36, 37, 38). This $48,000 so turned over by the Yakima Valley Bank to the Central Bank was in the form of two drafts, one for $45,000 drawn on the Bank of California at Tacoma and the other for $3000 drawn on the Fidelity National Bank of Spokane (Testimony of Lemon, Tr. 36). The Central Bank thus received the sum of $48,000, substantially all of which, as we shall later demonstrate, was the proceeds of plaintiff's check in transmissible form, i. e., in drafts. Yakima is located about midway between Seattle and Spokane; but instead of forwarding such proceeds di-

rectly west to the Seattle National Bank, the Central Bank transmitted the same in the opposite direction to the Trust Company at Spokane, at the same time transmitting a few cash items and notes amounting to about $4000 for re-discount, thus making a total charge of approximately $53,000 on that day against the Trust Company. The Central Bank then drew a draft on the Trust Company in favor of the Seattle National Bank for the full amount of the collection items received by it from the latter, to-wit, $51,188.04. All this happened on the 21st day of January, 1921.

On the next day, January 22nd, the Trust Company received said remittance including substantially all the proceeds of plaintiff's check and deposited the same to the credit of the Central Bank, collecting the $3000.00 draft on the same day at Spokane and the $45,000.00 draft at Tacoma on January 24th.

The draft in favor of the Seattle National Bank, issued on January 21st to effect returns on plaintiff's check, was not presented to the Trust Company until the 26th day of January. Prior to presentment of said last mentioned draft the Trust Company learned that the draft had been issued and was outstanding. With such knowledge and prior to presentment thereof, the Trust Company charged back to the Central Bank on its books certain overdue or otherwise bad rediscounts and other paper indorsed by the Central Bank, and undertook to absorb and apply all the proceeds of plaintiff's

check received by it to its indebtedness against the Central Bank. Consequently when the Seattle draft was presented on the 26th payment was refused, and on the subsequent demand of plaintiff to pay over the proceeds of the check so received by the Trust Company, payment of the whole, or any part thereof, was likewise refused (Tr. 11).

When the Seattle National Bank was advised of the non-payment of its draft, it charged back to the plaintiff the amount of the latter's check for which the Seattle National Bank had given its provisional credit, and the plaintiff has never received any return in money, or any returns whatever, on account of its check. (Testimony of Miner and Bray, Tr. 93).

It is expressly stipulated in the record that the Central Bank was insolvent during all the month of January, 1921, and part of the evidence on that feature of the case is omitted (Tr. 88). The Central Bank was closed by the Bank Examiner on January 27, 1921 (Tr. 58).

3. The Controverted Questions of Fact.

In addition to the foregoing facts, the Court further found that both the Trust Company and the Central Bank were chargeable with knowledge of the Central Bank's insolvency and that the Trust Company was also chargeable with knowledge of plaintiff's ownership of the fund received by it.

These findings are assailed by appellant but are, in our opinion, conclusively established by abundant proof. The pertinent testimony will be summarized and discussed under appropriate headings in the argument.

4. The Issues of Law.

Appellant also questions the trial court's conclusions of law, (1) that the Central Bank received and held the proceeds of plaintiff's check in trust, and (2) that the fund was traceable into the hands of the Trust Company.

Argument.

5. Outline of Subject Matter.

In answer to appellant's contentions plaintiff undertakes to support the decree upon the following grounds, in the order stated:

1. The title to the check remained in plaintiff and when collected the Central Bank received and held the proceeds thereof as agent or trustee for plaintiff (a) because such was the express understanding and agreement between plaintiff and the Central Bank, and (b) for the further and independent reason that the Central Bank was insolvent and consequently disabled from becoming a lawful debtor of plaintiff.

2. Appellant had full knowledge of plaintiff's rights and the insolvency of the Central Bank.

3. The identity of the proceeds was preserved as a fund and were traceable into the hands of the Trust Company.

6. Title to Check and Proceeds Thereof Remained In Plaintiff by Virtue of Express Agreement.

Plaintiff's title to the check is not questioned. The cases cited to the next point are, however, specific and conclusive.

Appellant argues that upon collection title to the proceeds vested in the Central Bank. Our first answer to this contention is the express understanding and agreement of the parties. The capacity in which the Central Bank received and held the check depends upon the instructions contained in the letter of the Seattle Bank transmitting the same. By this letter the Central Bank is instructed that the check is transmitted for collection and returns, and it could, of course, accept collection on no other terms. The language of this letter is: "We enclose for *returns,* the following *cash items*" (Testimony of Miner, Tr. 33). In the banking business this language has a definite and certain meaning. It means that the recipient is not to credit the sender with the items sent for collection, but to collect and remit; and in fact, it was treated as a cash transaction by both banks. No charge was

made against the Central Bank by the Seattle Bank; likewise, no credit was ever given by the Central Bank to the Seattle Bank (Testimony of Miner, Tr. 34; testimony of Lemon, Tr. 81). Under such state of facts has been held almost unanimously that the proceeds of collection belong to plaintiff. The Federal Courts are unanimously for plaintiff.

> *Holder v. Western German Bank,* 136 Fed. 90, 68 C. C. A. (6th) 554: facts identical; check transmitted for collection and "remit New York Exchange"; holding collecting bank trustee of proceeds for owner, the court said: "The bank could not rid itself of that relation and became the mere debtor of the plaintiff by its own act. The trust was part of the plaintiff's security. Neither the plaintiff nor the Western German Bank, in his behalf, ever consented that the Florida bank should cast off the trust and become the plaintiff's debtor. It would be a most absurd consequence if a man in the possession, as an agent, of a fund belonging to another, could convert the fund into his own property by sending his check to the owner, and then, upon some change in his own circumstances, direct his bank not to pay it, and so transform himself into a debtor. Of course, if the owner consents to such a change of relationship between himself and his agent, or where the circumstances indicate that a credit in account is expected, which is the same thing, the result is different, because the destination of the fund is altered by agreement. But here there was no such agreement. The check was sent for collection and remittance. Satisfactory proof should be required that the owner assented to such change, in view of the consequences which would ensue. A man might be quite willing to trust another with the collection of his money when he would be very unwilling to loan it to

him. It would seriously impair the facilities for collecting commercial paper if it should be exposed to the hazards of conversion by the agent into whose hands the proceeds might come."

Titlow v. McCormick, 236 Fed. 209, 211; 149 C. C. A. (9th) 399; paper "received for collection"; owner not a customer with checking account and remittance implied; this court there held: "We regard it as clear that the relation of *cestui que trust* and trustee existed between the appellee and the appellant bank. In the similar case of American Can Company v. Williams, 178 Fed. 420, 422, 101 C. C. A. 634, 646, the Circuit Court of Appeals for the Second Circuit said: 'The relation of *cestui que trust* and trustee undoubtedly existed between the plaintiff and the Fredonia Bank. The bank violated every duty which it owed the plaintiff. The proceeds of the plaintiff's drafts held by it or its agents constituted trust funds which might be followed into the hands of the receiver, if they could be traced.' Authorities to this effect are so numerous as to make their citation unnecessary."

Macy v. Roedenbeck, 227 Fed. 346, 352; 142 C. C. A. (8th) 42; collection transmitted with instructions to remit "by draft", *held:* "It must be conceded that the relation of debtor and creditor never existed between Roedenbeck and the Bank of Sully. Roedenbeck was the owner of the note forwarded for collection and of the moneys collected, and it is clear that Roedenbeck could have obtained possession of the note at any time before its payment, or of the check, or of any moneys in the hands of the bank, received by the bank in payment of Roedenbeck's note."

Boone Co. Natl. Bank v. Latimer, 67 Fed. (C. Ct. W. D. Mo.) 27: paper transmitted for "collection and remittance"; proceeds a trust fund.

Clark Sparks etc. Co. v. Americus Natl. Bank, 230 Fed. (D. C. S. D. Ga.) 738: Identical facts; same holding.

The Decisions of each of the following states are exactly to the point:

(Ala.) *Hutchinson v. Nat'l. Bank of Commerce,* 41 So. 143: Transmissal with instructions to "remit in New York Exchange."

(Ark.) *State Nat'l. Bank v. First Nat'l. Bank,* 187 S. W. 673, 675; *held:* "The direction to remit immediately in Little Rock exchange shows unmistakably that the draft was sent for collection, and that there was no intention of the drawer to receive credit from the bank, but an expectation that the proceeds would be immediately forwarded, and the suggestion, remit in Little Rock exchange, was only to facilitate the receipt of the money."

(Ill.) *Nat'l. Life Ins. Co. v. Mather,* 118 Ill. App. 491, 494: forwarded for "collection and remittance".

(Ia.) *Messenger v. Carroll Tr. & Sav. Bank,* 187 N. W. 545: "collection and remittance".

(Kan.) *Kansas State Bank v. First State Bank,* 64 Pac. 634: "collection and remittance".

(Mich.) *Wallace v. Stone,* 65 N. W. 113: instructions to "collect and remit".

(Mo.) *German, etc. Ins. Co. v. Kimble,* 66 Mo. App. 370: "collection only".

(Neb.) *Griffin v. Chase,* 54 N. W. 572: sent for "collection and remittance".

(N. J.) *Thompson v. Gloucester City Sav. Inst.,* 8 Atl. 98: forwarded for "collection".

(N. Y.) *People v. Bank of Dansville,* 39 Hun. 187: facts identical; frequently approved by later New York cases.

(N. M.) *First Nat'l. Bank v. Dennis,* 146 Pac. 948: sent for "collection and remittance".

(S. D.) *Piano Mfg. Co. v. Auld,* 86 N. W. 21: transmissal for "collection and return".

(Tex.) *Contl. Natl. Bank v. Weems,* 6 S. W. 802: paper sent for "collection and returns". Leading case, frequently cited and approved.

(Wyo.) *Foster v. Rinker,* 35 Pac. 470.

Each and every one of these cases hold title to the proceeds of collection remains in the owner.

In order not to extend the brief but one decision is cited from each State. The cases could be multiplied indefinitely, but we deem it unnecessary. The net result of the reasoning and discussion of the authorities dealing with transactions identical with one in suit may be summarized as follows:

(a) When a bank consents to act as a collecting agent it assumes precisely the same duties and obligations toward its principal as an individual does

when he acts in the same capacity. In such cases no Court ever thought of discharging an individual from his trust relation because of a commingling of funds. If an attorney should remit the proceeds of a collection to his client by personal check or draft afterwards dishonored, no Court would stultify itself by deciding that the provisional acceptance of such check and presentment for payment would discharge the attorney of his trust relation and convert him into a simple debtor. Nor would it aid him to cite *Bowman v. Bank,* 9 Wash. 614, to the effect that the acceptance of a worthless draft or check operated as a payment or that the client purchased such check with the funds held by the attorney.

(b) The law governing the facts in suit is not to be confused with the law applicable to customers and depositors who assume with the bank the relation of an ordinary lender on time or on demand. In such cases the funds are deposited on the faith and general credit of the bank to be repaid subsequently, whereas, a remittance for collection and return is a strictly cash transaction without any intention of making a loan or even a sale or transfer to the collecting bank. Even if a cash sale or transfer were intended the result would be the same and would not be affected by an acceptance of the purchaser's draft or check, as it is universally held that no title passes where in such cases the paper received in lieu of cash payment is dishonored, as in this case.

(c) The trust relation as to the proceeds of collection is not destroyed *ab initio* by commingling or dissipation of the trust fund. Such conduct of the collecting agent may, however, eventually limit, or even defeat, the right to trace and recover the fund.

A practice or custom of commingling funds by a collection agent, however numerous its clients or complicated its business transactions, does not relieve it of its trust obligation. Banks solicit and transact an immense volume of business in conformity with the strictest fiduciary and confidential obligations, holding themselves out as "Trust" companies or trustees of the highest character, and are not at all inconvenienced by business complexities. It is, therefore, held in all the cases cited that the custom of banks to commingle funds in ordinary transactions will not be read into or regarded as part of an express agreement for collection and returns, like the one in suit.

7. Appellant's Argument and Authorities on this Point.

It was argued by the appellant (Brief p. 42) that it could not have been intended that the Central Bank should remit to the Seattle Bank in specie. This we concede, but the point has no significance. In the cases already cited, particularly *Holder v. Bank* (6th C. C. A.); *Macy v. Roedenbeck* (8th C. C. A.); *Hutchinson v. Bank* (Ala.) and *State Bank*

v. National Bank (Ark.), the forwarding instructions to the collecting agent expressly required remittance to be made in drafts or exchange. In practically all the remaining cases cited the remittance was attempted exactly in accordance with the facts in suit. Such fact was in all the cases held in no wise to affect the trust relation.

It is further argued by the appellant that it must have been the intention of the parties that when the Central Bank had made the collection it should commingle the funds so collected with its own funds. This we do not concede. It may be that this is often done by collecting banks, but if they do they charge the whole of the commingled funds with the trust so long as the proceeds of the collection can be traced into them. The commingling of funds has no effect upon the relationship of the parties to each other. As decided in the cases cited such practice is pertinent only to the question of tracing and identifying the trust fund.

In this connection appellant relies on the case of *Commercial Bank v. Armstrong,* 148 U. S. 50. This case is clearly not in point, and has never been so considered by the Federal Courts, or in fact, by any Court except in *First Nat'l Bank v. Davis,* 19 S. E. (N. C.) 280, cited by appellant. The decision in that case was rendered in 1893 and was certainly not overlooked in the various Circuit Court of Appeal cases and other cases already cited. In the case of *Titlow v. McCormick,* supra, decided by this Court, that decision was used by the receiver

in support of the identical contention here made by appellant, but this Court there held that any custom of banks to commingle funds did not affect the trust relation involved in the handling of proceeds of collections. The same situation is undoubtedly true of the various State decisions rendered long subsequently to the Armstrong case.

In that case the Supreme Court called attention to the fact that the collection contract required settlement between the banks only periodically on the first, eleventh and twenty-first of each month, and therefore contemplated a time deposit either general or special. It also further concluded that "these collections were not to be placed on special deposit and held until the day for remitting", but were to be treated as a general deposit, and that the transmitting bank in that case was to be treated as a general depositor. There the transmitting bank gave its correspondent bank even greater rights than it would have had under the ordinary general deposit, in this, that the general depositor has the right to withdraw his deposit at any time on demand by check or draft, whereas, in that case a credit of ten days was expressly stipulated. Such express limitation of the transmitting bank's right to the funds necessarily implied the relation of debtor and creditor.

The statement of the Court in regard to commingling of funds, and the use of the deposit by the bank, was made argumentatively and not as a recital of the contract itself.

This branch of the decision in the Armstrong case was influenced by the further fact that the receiver against whom recovery was sought had not and would not come into possession of the funds sought to be recovered, because the proceeds of collection had been applied to the indebtedness of the failing bank by its sub-agent making collection; although the failing bank thus used and dissipated the proceeds they were never commingled in the true sense of the word.

Another branch of the case deals with the proceeds of collections made by sub-agents owing the failing bank and from whom the receiver had or would receive a balance. The receiver was held as trustee for the proceeds, and this upon the specific ground that title to such *proceeds* remained in the owner, notwithstanding the aforesaid "collection and credit" arrangement. In both instances the paper had been honored and paid. In neither instance had the actual proceeds ever been transmitted to the failing bank or in anywise reduced to actual possession; in both instances the sub-agents claimed title to the proceeds; in one instance offsetting against the failing bank's indebtedness, in the other crediting it with a balance. Obviously, the two branches of the case are logically opposed to each other. The net result of the decision would seem to be that the proceeds of collection remained a trust fund until the same were dissipated by the failing bank. Such was the reasoning of the trial court (39 Fed. 684). That branch of the case up-

holding the trust is the one most usually cited by the courts with favor (*Old Nat'l Bank v. German-American Natl. Bank,* 155 U. S. 556) and is certainly a strong authority in our behalf. If an arrangement for collection and credit would authorize or permit the original owner of the proceeds to recover the same after collection in the hands of a third party, the arrangement under consideration should certainly be sufficient to accomplish the same result, on the assumption that such third party took with knowledge.

In any event, the reasoning of Mr. Justice Brewer that it was the intention of the owner to extend credit certainly has no application to the facts in suit. As already pointed out the arrangement here was a cash transaction without any credit whatsoever. Plaintiff in this case, moreover, is not seeking to charge the receiver who never received the proceeds of this collection but is, on the contrary, pursuing the Trust Company because it did receive such proceeds with knowledge.

Appellant depends primarily on the Washington cases cited by it. The expressions of opinion found in these cases are undoubtedly influenced by the conclusion of those Courts that the commingling of trust funds with other property defeated a right of recovery. According to the view of those Courts at that time there could have been no recovery in those cases even had they held in favor of the trust fund. In any event, they are opposed to the great

mass and current weight of judicial authority, are illogical and unsound and should not be followed.

Appellant insists, notwithstanding, that this Court should feel bound by the early Washington decisions. It is very doubtful, however, whether even the Washington Supreme Court would feel itself compelled to follow *Bowman v. First Natl. Bank.* In the later case of *Hallam v. Tillinghast,* 52 Pac. 329, the Court concluded that it was not necessarily a contract but simply a presumption based on custom that the parties intended a credit relation, and likewise conceded that such presumption would not arise if the evidence showed a definite agreement between the parties. It is clear that a different arrangement was contemplated by the parties here.

Again, in the very recent case of *Raynor v. Scandinavian American Bank,* 210 Pac. 499, the Washington Supreme Court overruled its prior decision concerning the right to trace trust funds and aligned itself with the modern doctrine on the subject. True enough, as appellant says, this decision was rendered by a different department of the Supreme Court, but a majority of the department rendering the contrary previous decision concurred in overruling the same in this case. Hence, the authority of the early Washington cases must be regarded as considerably weakened even in that state.

8. Law Announced by Federal Courts Followed Regardless of Contrary State Decisions.

But it is immaterial what rule is adopted by the Courts of the State of Washington on this point, as it is a question of general commercial law upon which this Court will rule independently of state decisions and in accordance with the law as declared by the Federal Courts.

> *In Titlow v. McCormick, supra,* the early Washington cases were called to the attention of this Court on this very point but were disregarded.

> So, *in re Jarmulowsky,* 249 Fed. 319 C. C. A. (2nd), the Circuit Court of Appeals there held that it was not controlled by state decisions on the question as to whether or not title to a check deposited for collection passed to the bank (general deposit).

> *Oates v. Bank,* 100 U. S. 239, involving promissory note made and payable in Alabama; transaction entirely intrastate. *Held:* "Not bound by the decisions of those courts upon questions of general commercial law. Such is the established doctrine of this court, so frequently announced that we need only refer to a few of the leading cases bearing upon the subject".

> *Presidio County v. Noel Young Bond Co.,* 212 U. S. 58, refusing to follow the State Supreme Court decisions invalidating county bonds and upholding validity thereof on the grounds of general commercial law. Also refusing to be bound by State Court decisions as *res judicata.*

Supervisors v. Schenck, 72 U. S. 772, 784; County bonds held valid, notwithstanding contrary state decision.

Brooklyn, etc. Railroad Co. v. National Bank, 102 U. S. 14, affirming the rule in the Oates case.

Liverpool Steam Co. v. Phoenix Insurance Co., 129 U. S. 397, at page 443.

Swift v. Tyson, 16 *Peters 1,* the leading case.

Hamley v. Bancroft, 83 Fed. 444, (U. S. Circuit Court, California Morrow, Justice), declining to follow a decision of the state court as to the construction of a contract.

The cases cited by the appellant on page 50 of its brief in opposition to the above rulings are so clearly inapplicable to the case at bar that they need no comment.

9. Relation of Creditor and Debtor Does Not Arise Under Any Collection Agreement Prior to Payment and Receipt of Actual Money.

In our discussion of the case heretofore we have proceeded upon the theory that the Central Bank had received the proceeds of plaintiff's check and we have so stated. And this is true in the sense that there had come into its hands the two drafts for $48,000 above referred to. But it had not completed the *collection* to the extent that it had, under any arrangement or understanding, the right to con-

sider itself as a debtor instead of an agent or trustee. It had not as yet, commingled the proceeds of the check with its own funds because it had not received any money which it could so commingle. The two drafts which it received, aggregating $48,000 were transmitted to the Trust Company and the latter completed the collection and received the funds. The larger draft of $45,000 was not paid until the 24th of January, which was the day before the Examiner, with the knowledge of the Trust Company, left Spokane for Yakima to close the Central Bank.

Never having received the proceeds of plaintiff's check in *actual money* capable of being commingled with its general assets, the Central Bank could not become the debtor instead of the agent of plaintiff under any of the cases, even those involving a collection arrangement providing expressly for a credit relation.

Armstrong v. National Bank of Boyertown, 14 S. W. (Ky.) 411, approved in Commercial Natl. Bank v. Armstrong, 148 U. S. 50.

Foster v. Rinker, 35 Pac. (Wyo) 470.

National Bank of Commerce v. Johnson, 89 N. W. 49.

Levi v. National Bank of Missouri, 15 Fed. Cases No. 8289.

Fifth National Bank v. Ashworth, 16 Atl. (Pa.) 596.

10. Debtor and Creditor Relation Under Any Collection Arrangement Prohibited by Central Bank's Insolvency.

The law that an insolvent bank has no right to accept the money of another on its general credit is now so thoroughly established as to require no discussion. This general rule is not questioned. Appellant contends, however, that plaintiff must be regarded as having become a general creditor of the Central Bank in the absence of proof and a finding that the Central Bank was insolvent of its own knowledge.

Under the facts in suit and the authorities already cited in support thereof, the finding of known insolvency is not essential to the existence and continuance of plaintiff's title to the proceeds of collection.

Even if plaintiff could under the facts be considered in the light of a general depositor proof of known insolvency does however support plaintiff's title to the proceeds of collection. So much is conceded by appellant.

The insolvency of the Central Bank is admitted but corporate and official knowledge is, however, disputed. The finding of such knowledge on the part of both the Central Bank and the Trust Company was, we think, cogently proved. In this connection we shall first summarize and review the testimony establishing knowledge of the Central Bank's insolvency on the part of its officers and agents.

11. The Central Bank had Complete Knowledge of Its Insolvency.

The following testimony does, we think, amply support the finding of knowledge on the part of the Central Bank, its officers and agents.

Insolvency during the whole of January, 1921, is admitted by appellant (Tr. 88). The following further admitted facts appear of record. In the latter part of December, 1920, and first few days of January, 1921, very heavy, in fact abnormal, withdrawals were made by depositors. In common parlance there was a "run" on the bank during the first few days of January (Ellis, Cashier, Tr. 94). The deposits in November, 1920, amounted to $665,000; on January 3rd, $513,000; on January 4th, $497,000 and on January 5th, $482,000, with a continual decrease thereafter at the rate of about $4,000 per day until on January 21st, $430,000; January 25th, $426,000 (Bank closed). (Tr. 84). Thus it appears the bank's credit and standing with local depositors had become greatly impaired, and that owing to general market conditions no improvement in deposits could be expected even if confidence were restored.

The foregoing conditions and a similar state of affairs during December, 1920, compelled the Central Bank to provide, for it, an enormous amount of cash. It therefore borrowed $50,000 on bills payable secured by Liberty Bonds. Although this was the legal limit of borrowing by such means (Sec. 3261

Rem. Comp. St.) it was but a drop in the bucket. Collections were so inadequate that prior to the first of January the Bank had been compelled to rediscount $31,000 of its bills receivable with the National City Bank at Seattle and $114,000 with the Trust Company. The $200,000 thus provided proved wholly inadequate to meet the exigencies of the situation, and in the early days of January it became necessary to create an overdraft of more than $50,000 with the Trust Company (Tr. 87). Its statutory cash reserve had become a minus quantity. The small per cent of cash reserve shown by the books consisted almost wholly of dishonored paper fictitiously carried as cash, and if correctly entered would have shown an additional indebtedness of about $8000. The only possible resource left was through the collection and rediscount of its bills payable, already somewhat depleted and "slowed down" through meeting the withdrawal of about $150,000 deposits during the month of December.

Out of this note pouch the bank and its officials were under the dire and compelling necessity of promptly meeting a sudden loss of more than $50,000 in deposits during the first three or four days of January, and were, moreover, face to face with the absolutely certain further decline of deposits at the rate of approximately $4000 a day. They were also required to cover dishonored and past due fruit and produce drafts amounting to more than $8000 and in addition they were required to meet and cover a constantly maturing contingent liability on

the $145,000 rediscounted notes. In other words, they were required to use the note pouch to cancel without delay an indebtedness exceeding $60,000 and were, moreover, compelled to provide a further sum in excess of $4000 per day in order to keep afloat.

In the face of such imminent peril and impending disaster, can it be believed that the note pouch of the bank was not a matter of serious and grave concern on the part of the officials in charge? Can it be doubted for a moment that it received the most careful and painstaking attention, that it was the object of long and searching investigation, and that the value of the collateral, if any, and the financial condition of the borrowers and their ability to pay was not most thoroughly canvassed and very carefully appraised?

There was nothing peculiar about the bank's paper which would make its valuation and appraisement difficult. The testimony is undisputed that the credit men of the other Yakima Banks were easily able from their general knowledge, and upon a single day's investigation, to appraise accurately the bank's bills receivable and say for a certainty that more than $100,000 of such paper was totally valueless and the remainder of such doubtful value that the bank could not liquidate for more than thirty per cent of its indebtedness (Tr. 66, 78, 79, 131). That such knowledge was not uncertain or mere guesswork is established in the light of subsequent events, as appears from the testimony of the liqui-

dator, based on developments a year later that the assets would not realize to exceed thirty-five or forty per cent of the indebtedness (Tr. 99).

Appellant (Brief p. 62) admits that the bank's officials had full knowledge of all things concerning its financial condition, save one, that they did not know of the doubtful quality of the paper until the very last, when they were advised by the Yakima bankers that much of it was utterly bad. Although a large part of the loans had been negotiated by the bank's then acting officials, and the remainder had been frequently renewed; regardless of the further fact that such officials had been in constant and daily contact with the note pouch, devoting practically all their time and attention to securing financial statements and history sheets of the various borrowers for the purpose of negotiating rediscounts; and, in the face of the fact that they had been strenuously endeavoring to force collections to the very limit in order to meet the enormously pressing and severe needs of the bank for ready cash; still, appellant questions the knowledge of these officials as to the true value of the bank's paper until they were so advised.

Let us examine the knowledge of the parties handling the note pouch a little more in detail. Mr. Buchholtz who had charge of the note pouch from the 6th until the 25th of January, and Mr. Triplett of the Trust Company in Spokane, disclose adequate knowledge of the subject in their correspondence. In the letter of January 6th (Tr. 142),

Buchholtz offers Franc Investment note $11,000 endorsed by Mr. Barghoorn, president of the bank, and further endorsed by the bank without recourse, saying:

> "Don't swear; I figure that you are not banking on the Central Bank endorsement anyway. You have got an overdraft and will have."

To this Triplett replies, January 8th (Tr. 145),

> "We have great confidence in your ability to pick out the kind of notes we want and will ask you to work along those lines instead of asking us to take the Franc note. I did my darndest to put it over for you, but the powers that be could not see me for dust."

Letter, Buchholtz, January 7th (Tr. 143) offers for rediscount insurance premium notes ranging from $50 to $225.00 with comment "Don't swear, I'm trying this out to see what you think of it". Letter, Triplett, January 14th (Tr. 168): "We all feel there is going to be a good sized loss on Small", one of the bank's borrowers, owing $16,250 exclusive of liability on dishonored fruit drafts (Tr. 182) "Our people aren't satisfied with the Small notes. They think he is broke" (Tr. 226). Letter, Triplett, January 15th (Tr. 172), questioning the quality of certain notes. Letter, Buchholtz, January 18th (Tr. 192), sending two little but good notes says, "I wish I had about $20,000 of stuff like this", indicating positively that he had not and remarking "Don't laugh, every little helps, you know". Letter Buchholtz, January 19th (Tr. 193), submitting poor note for collateral saying, necessary to do so

from time to time as substitute for notes collected, and proceeds held by Central Bank. Letter Buchholtz, January 19th (Tr. 194) $2500 note withdrawn from collateral to bills payable and rediscounted, indicating absence of good paper in note pouch. Letter Buchholtz, January 19th (Tr. 198), admitting impropriety of not charging up unpaid rediscount at maturity, saying:

> "It is rotten but for the present no doubt for some weeks it will remain a question of which is preferable to you, over drafts or past due rediscounts. I would like to increase our rediscounts about $20,000 and get a balance enough ahead to cover charges of maturities, but would you consider stuff that would not be paid until the 1921 crop returns are in?"

thus indicating the only quality of paper available for rediscount. Such paper can certainly be characterized as "slow", but judged by the results of 1920, it certainly could not be described as "good". Letter Triplett, January 20th (Tr. 201), questioning value of note. Letter Triplett, January 20th (Tr. 203), discussing value of paper substituted as collateral saying, "I noticed you don't say *security*. Merely use the word 'collateral'. Nuf sed. However, there are some things we have to make the best of". Letter Triplett, January 20th (Tr. 204), summarizing general conditions adversely affecting value of the bank's paper. Letter Triplett, January 21st (Tr. 208), condemning note offered as collateral substituted for note withdrawn for rediscount, condemning it as utterly worthless, but accept-

ing same, thus indicating belief that nothing better could be had. Letter Triplett, January 21st (Tr. 209), accepting for rediscount note of questionable value, thus indicating knowledge that nothing better could be obtained; finally Letter Buchholtz, January 21st (Tr. 219) saying,

> "At present practically all of the paper which I have nerve enough to send for rediscount is there, with the exception of a small amount in the process of collection or renewal, and some miscellaneous small stuff on which we haven't statements and information",

thus clearly indicating the possession of statements and information on all paper except "some miscellaneous small stuff", undoubtedly the very information enabling the other Yakima bankers to appraise the paper quickly.

Thus it appears that Buchholtz, in full charge of the note pouch for the Central Bank and, as plaintiff contends, also for the Trust Company, was, on the 21st day of January, the very day plaintiff's check was collected, possessed of complete knowledge that all the Central Bank's paper which could possibly be considered fit for rediscount had already been negotiated and that the Central Bank was without any resources whatsoever to meet the daily withdrawal of its deposits or satisfy its $16,000 overdraft (Tr. 87).

Buchholtz, true to form, says these statements refer only to the liquidity and not to intrinsic value. What about the Small item alone, notes $16,250, overdraft $1900 (Tr. 182) and stranded fruit drafts

$10,000 (Tr. 210, 233), total $28,000.00? Some of this paper had been rediscounted, presumably on the assumption that it was better than the remainder of the note pouch. The idea that Buchholtz could not and did not appraise the bank's paper accurately is simply preposterous. Checking up country banks was his business; he knew the game; he was "one of our right hand men"; "we considered him our *prize* man" (Tr. 52, 104, 121).

The indisputable knowledge of Buchholtz is clearly imputable to the bank. The mere fact that he had not been given an official title is of no consequence. He was in complete charge of the credit department and had full authority in the matter of collections and rediscounts. In other words, he was in full and complete control of the most essential function of the bank at that time and was not subject to the authority of the cashier (Testimony of Barghoorn, president, Tr. 49, 51, Ellis, Cashier, Tr. 97; letter Buchholtz, Tr. 184-191). He was the whole show with Ellis on the job for effect (Tr. 126, 190).

The point urged by appellant that he was without authority to close the bank is immaterial. Although such power lies solely with the Board of Directors, it is, nevertheless, universally held that knowledge of an agent in charge of corporate affairs acquired in the course of duty is imputed to his principal. Extended citation of authority is unnecessary. *Clark etc. v. Americus Natl. Bank,* 230 Fed. 738, is a good example. In that case, knowledge of insolvency on the part of an assistant cashier was imputed to the

bank. Again, in *Pennington v. Third Natl. Bank,* 777 S. E. (Va.) 455, the cashier's knowledge of insolvency caused solely by his embezzlement and unknown to the directors was imputed to the bank.

Mr. Ellis, the cashier, must also be held to have been in possession of full knowledge of the bank's financial condition for the reasons already stated. There is nothing whatsoever in the record to justify a contrary conclusion. Appellant misinterprets his testimony concerning his knowledge. The statement that he had not had an opportunity to make himself acquainted with the quality and value of the bank's loans referred solely to his knowledge in June, 1920, when the Bank Examiner made his examination and criticised his methods (Tr. 97). He had then been with the bank only a short time (Tr. 93). His testimony is totally devoid of any assertion on his part that he was not fully advised in January, 1921, more than six months afterwards. Any optimism he may have had did not limit his knowledge; it merely indicates the use he may have made of it. The essential question to be determined is whether he was in possession of the facts. His general intelligence and experience in the banking business are not questioned or criticised, and even if not up to standard it is impossible to believe that he had not learned in the course of his duty extending over many months what the other Yakima bankers were able to ascertain and definitely determine within a few hours. He was, of course, the subject of criticism by the Trust Company because he did not send

satisfactory rediscounts. The correspondence already reviewed shows that Buchholtz could do no better. The efforts of both were the subject of ridicule, one hostile, the other friendly. The ability of Buchholtz is not questioned. It would, therefore, appear that the failure of Ellis was not due to want of capacity but to the force of adverse circumstances. His intelligence and knowledge can hardly be questioned because he defended himself with a little optimistic boosting or trader's talk in the matter of rediscounts. Some men have a sense of loyalty to the institutions they serve and every one objects to adverse criticism. Naturally he expressed the brighter side. He does not disclaim knowledge but merely denies responsibility on the ground that the bad loans were not of his making, and that the financial condition of the bank was a matter beyond the remedial powers of himself, or anyone else, i. e. that a large part of the bank's paper was worthless when he joined the institution, and such undoubtedly is the fact.

As already appears, Buchholtz, a stranger in Yakima, readily satisfied himself of the bank's insolvency in a very short space of time. It is inconceivable that he did not communicate his findings and knowledge to Ellis. The evidence is conclusive that he did so, and that he did moreover insist that Ellis should govern his conduct accordingly (Tr. 95, 184-191).

So far as Barghoorn, the president, and the other directors are concerned it is a plain case of "ab-

sentee landlordism". Barghoorn, after pledging his assets to the Trust Company to cover his personal indebtedness and guaranteeing that of the bank, practically surrendered any voice or control that he may ever have exercised and left the bank to its fate in the hands of the Trust Company. Mr. Ross, the vice-president, and a director, but had nothing to do with the bank, knew the situation (Tr. 67). He did understand the situation (Tr. 144, 166). As said by Buchholtz, the bank was "a ship without a captain" (Tr. 153). Ellis and Buchholtz were, therefore, the only corporate agents actually in charge.

There can be no doubt that knowledge on the part of Ellis and Buchholtz is conclusively established.

Exposure to facts or means of knowledge constitutes proof thereof (*In re Silver,* 208 Fed. 797):

> "When we say that a person has knowledge of an existing condition we mean that his relations to it, his association with it, his control over it, his direction of it are such as to give him actual, personal information concerning it" (*Parrish v. Commonwealth,* 125 S. W. (Ky.) 339, 347).

Knowledge far less than that shown on the part of these agents has been held to support a finding of known insolvency. Even in the absence of proof of actual knowledge such as is here presented, it has frequently been held that knowledge of the bank's

financial condition on the part of its active officials will be presumed.

Clark etc. Co. v. Am. Natl. Bank, 230 Fed. 738.

In *State v. Welty,* 118 Pac. (Wash.) 9, 15, it is said that

> "if, by the exercise of such (reasonable) diligence in making an examination and inquiry in respect to the solvency or insolvency of the bank, its true condition could have been discovered, then, under such circumstances, the presumption will be that they had knowledge" (citing cases).
>
> *State v. Quackenbush,* 108 N. W. (Minn.) 953, 957.

A reckless indifference or neglect will not be inferred to overcome such presumption. By continuing business the Central Bank and its officials made active representations of its solvency, and, as has been shown, the actual contrary fact was within their easy means of knowledge.

> "If the fact be one within his easy means of knowledge and he have no knowledge of the fact a jury would be authorized to believe that the statement was knowingly false" *(Hindman v. First National Bank,* 112 Fed. 931, 944; 50 C. C. A. (6th) 623).

In that case Judge Lurton quotes the following from the leading English authority on the subject:

> "Although means of knowledge are * * * a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely ab-

> stained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false" *(Derry v. Peek,* 14 App. Cas. 337, 375).
>
> In *Nevada Bank v. Portland Natl. Bank,* 59 Fed. 338 (Gilbert J.) dealing with a representation as to the solvency of a third party, it is said: "By the weight of modern authority it is held that the law imputes an intention to deceive in every case where one recklessly asserts that to be true which is untrue and concerning which he pretends to have a knowledge which he has not (citing cases). Of this class is the cause of action contained in the second count of the complaint. It is there alleged that the representations were false; that they were made for the purpose of gaining credit for the Ainslie Lumber Company; that they were negligently and carelessly made, without examination or investigation; that, if investigation had been made, the untruth of the facts represented would have been made apparent. These allegations sufficiently state a cause of action." (Fraud and deceit.)

Under the facts and the law the Central Bank's knowledge of insolvency is, we think, conclusively established.

With full and complete knowledge of its hopeless insolvency, it was the duty of the Central Bank to close its doors and in failing to do so was guilty of fraud. Whatever may have been the right and privilege of insolvent banks in past years to continue operations in the forlorn hope of ultimate rehabilitation they are now required under present

federal and state legislation to transact business in a safe manner and in full compliance with statutory prohibition against inviting credit and consequent loss when insolvent. Although banks and their officials are not required to know the solvency of their institutions at their criminal peril,

> "Safety is secured by requiring officers having the control or management of banks to keep closely in touch with the assets, and to have a reasonable knowledge of their value, and to refuse to receive deposits when they find they are not amply sufficient to pay all debts exclusive of capital stock, surplus, and undivided profits of stockholders. If a bank continues to do business when it is not solvent in this sense, and it receives deposits, it is guilty of negligence of so hazardous a character as to amount to positive fraud and criminal liability under the statute" *(Gass v. State,* 172 S. W. (Tenn.) 305, 309-10).

> "Under the statute the bank has no right to continue business when its officers know, or have good reason to know, that it is unsafe or insolvent. If it does continue business, then the intent to cheat and defraud whoever deals with it irresistibly arises. The dishonest purpose comes from the knowledge of the officers, extends to all persons having dealings with the bank, and it is immaterial whether there was or was not a distinct intent to cheat or defraud a particular customer; otherwise, the bank might hide behind the alleged *bonafides* of the official and the very purpose of the statute be defeated" *(Hyland v. Roe,* 87 N. W. (Wis.) 252, 253).

There is no use to discuss any hopes of recovery. On the very day plaintiff's check was collected,

Buchholtz likened himself unto a physician at the bedside of a dying patient. His bulletin reports immediate death and dismisses chances for recovery as well meant consolation talk for the mourning family (Tr. 221). Can the Central Bank's certain and absolute knowledge of its insolvency be doubted?

12. Appellant had Full Knowledge of the Central Bank's Insolvency Through its Agent There.

The knowledge of Mr. Rutter, president of the Trust Company, and of Mr. Triplett, vice-president, is conceded to be binding on appellant. It does, however, disclaim the relationship of principal and agent so far as the knowledge of Mr. Buchholtz is concerned. That he was at all times the agent and representative of the Trust Company is, we think, fully established by the proof.

Mr. Buchholtz entered the employment of the Trust Company in the early part of 1914, and has so continued, with certain interruptions, most of which were brief, up to the present time (Tr. 125, et seq.). True enough some of the witnesses testified that the relations between the Trust Company and Mr. Buchholtz were severed when he left for Yakima. We are of opinion, however, that such statements are to be regarded as mere conclusions of the witnesses instead of an accurate statement of the actual facts. Mr. Rutter and Mr. Triplett did, however, testify that they valued Mr. Buchholtz very highly and were sorry to lose him, but that they

took into consideration his welfare and recommended him for the place as they thought

> "it might be a good thing for him as it looked at that time as if the Central Bank was *a nice opportunity for a young man* in a growing town like Yakima" (Tr. 101).

The unimpeachable facts completely nullify this testimony.

The relations of the two banks were very close indeed. Mr. Barghoorn had been a director of the Trust Company since 1908, but found his finances in such condition that he had been compelled to pledge the best of his assets to the Trust Company to cover the indebtedness of himself and his bank (Tr. 138). The Central Bank was, moreover, a very small institution with a capital stock of only $50,000 and was then indebted to the Trust Company on bills payable and rediscounts in the sum of $142,000. At that time it had been suffering a severe run on its deposits and had accumulated a large overdraft with the Trust Company (See evidence, supra). Mr. Ellis was right then in communication with Mr. Barghoorn concerning the bank's predicament (Tr. 94).

The consultations between Mr. Barghoorn, Mr. Rutter, Mr. Triplett and Mr. Buchholtz with reference to Buchholtz' going to Yakima, occurred on the 5th day of January, at about 5 o'clock P. M. There is no evidence that the matter was ever broached before. The decision that he should go was arrived at instantly. In one hour and one-

half from that time Buchholtz's grip was packed and he was on the train for Yakima (Tr. 133). On the same day Mr. Triplett, vice-president of the Trust Company, wrote Mr. Ellis, the cashier of the Central Bank, a letter in which, after referring to certain notes held by the Trust Company for rediscounts as unsatisfactory said,

> "but as Mr. Buchholtz who is one of *our right hand men* (italics ours) is accompanying Mr. Barghoorn tonight, he will endeavor to obtain substitution of other paper" (Tr. 115-116-52).

When Mr. Triplett gave this testimony he had evidently forgotten this letter and the only explanation he could offer on cross examination was that "we had not yet gotten to the place where we realized he was gone". It was not stated when they did get to the place where they did realize it.

Notwithstanding the protestations of Mr. Triplett and Mr. Rutter, Buchholtz wrote a letter to Mr. Triplett on the 10th of January, five days after his arrival in Yakima, in which he says:

> "To assist Mr. Blake in checking up collateral, the following is now in my possession as *agent for the Spokane & Eastern Trust Company*" (italics ours).

Then follows a list of notes (Tr. 154).

After Buchholtz' arrival in Yakima he carried on a voluminous correspondence with the officers of the Trust Company in Spokane, conveying to them the most detailed information, some of it of an intimate and private character, not only of the condition

of the Central Bank, but his relations and experiences with the other employees. These letters are all set forth in the record from pages 142 to 237. Yet, during that entire period, he did not write a single letter to Mr. Barghoorn, who lived in Spokane and was absent from Yakima during the entire period except for a few days (Tr. 51,117). Does this look as if he was representing Barghoorn alone, and not at all the Trust Company?

His employment was never authorized by the Board of Directors of the Central Bank (Tr. 94), and the liquidator of the bank has refused to allow his salary, claiming that he was not an employee of the Central Bank (Tr. 116).

The very first day after his arrival at Yakima, he sent to the Trust Company a note for $11,000 upon which Sikko Barghoorn (to whom he refers as S. B.) for rediscount, and says that he is doing this on his "own initiative and not at the request or suggestion of S. B. or anyone else". Notwithstanding the fact that S. B. was then in Yakima, as shown by his letter of the next day (Tr. 145).

Having referred now to the first letter, we next invite attention to the next to the last letter which Buchholtz wrote. This letter is dated the 24th of January, 1921, and is addressed to Mr. Triplett, the last sentence of which is, "You see I don't know just how far you can go on S. B. and since he has resigned from the Board (of the Trust Co.), it must be down to a clean-cut proposition" (Tr. 237). Does this sound as if he were representing S. B.?

It was testified, as pointed out by the appellant, that complaints were made by the State Banking Department to Barghoorn concerning Ellis, his cashier; that Barghoorn had been urged to make a change in this office and had finally concluded that eventually he would have to do so; that the Trust Company was not satisfied with the way Mr. Ellis was handling the re-discounts which they sent to the Central Bank; that Mr. Buchholtz was hired by Barghoorn to go to Yakima and take charge of the selection of the rediscounts, acting in that capacity solely as the agent of the Central Bank; that it was contemplated that eventually he would succeed Mr. Ellis as cashier; that they thought this presented a fine business opportunity to Mr. Buchholtz—and so forth; and that these were the only reasons for Mr. Buchholtz leaving Spokane and going to Yakima into the Central Bank.

It is possible that there may have been in the minds of some of them the possibility that Buchholtz might be given the office of temporary cashier until Barghoorn might find another acceptable man to take the office permanently. This would have been in line with Buchholtz' previous activities. But to be asked to believe that Mr. Buchholtz left the Trust Company for the Central Bank to avail himself of "a fine opportunity for a young man", while a run was on, and the very life of the Central Bank was trembling in the balance; and in

view of the fact that the matter was first broached at five o'clock on the day he left; and that he was on the train at 6:30 that night, was too severe a tax upon the credulity of the trial Court.

It may be true that after the 5th of January, Buchholtz was no longer on the payroll of the Trust Company, but this fact is not significant; for when a large bank sends its outside "doctor" to take charge of one of its failing "patients", it rightfully makes the "patient" pay the expense. As Buchholtz puts it, the Trust Company was "relieved of his salary" (Tr. 160).

An "outside doctor" is what Buchholtz really was. One cannot read his own evidence and come to any other conclusion (Tr. 125).

The larger banks have their outside men who are kept for the purpose of taking charge of emergency cases such as that of the Central Bank. He himself told Mr. Miner that he was the outside man for the Spokane & Eastern Trust Company (Tr. 72); and introduced himself to Miner by presenting his card in which he described himself as being in the "Credit Department of the Spokane & Eastern Trust Company"; and he so introduced himself to Mr. Louden, cashier of the First National Bank of Yakima. This conversation with Louden took place shortly before the failure of the Central Bank. Buchholtz introduced himself as a "representative of the Trust Company"; stated that he was "looking after some affairs of the Trust Company" and that he had

just finished a similar job in the northern part of the State (Testimony of Louden, Tr. 80).

On January 9th Buchholtz wrote to Rutter in which, after asking Mr. Rutter to use his influence with State Banking Department to keep the examiners away, gave as his reasons for such request that customers would see them at work and possibly start withdrawals, and says: "As for myself. No one has gotten curious,—I am a new man working in here in Van's place, who just left the first". Van was one of the former assistant cashiers of the Central Bank (Tr. 95). Buchholtz is thus congratulating himself that no one has as yet discovered that he is there, practically in charge of the bank for the Trust Company.

We say practically in charge, for in his letter of January the 18th to Mr. Triplett he gives an account of how he had it out with Ellis as to who was boss (Tr. p. 184) and at the same time as to why he had been sent to take charge. He writes:

> "To end our argument and conversation we both agreed that it was desirable that he stay on the job for effect, and I added that I hoped strongly that the prospective purchasers would buy the institution and bring enough deposits to take up all indebtedness *and clean up with the S. & E.* and stay out and that as the new people had expressed a desire to have him remain with them I wished him and the bank every possible success in the world, but in the meantime, while I was here, there was no sense in the bank paying my salary and *heavy expense* if he was going to pull any more stunts over me like this one; that I had lots of other work that

> I could do and didn't need this job as far as I was concerned, *but that I had been sent here to help liquidate and that results were expected of me* and I wouldn't stay without his recognition and cooperation. As he expressed it, 'ripped him up pretty severely', but Ellis finally promised that he would see nothing of importance was done over my head again."

In answer to this letter Triplett commends him and especially Buchholtz' insistence that the policies of the Directors be disregarded, and he says:

> "The kind of business you should support now is that of *non-borrowers* who will have crops and *whose deposits can be used to liquidate indebtedness"* (Italics ours) (Tr. 213).

These letters, together with that of January 9th, disclose the true situation, i. e. that Buchholtz had been sent to Yakima because of the heavy indebtedness of the bank to the Trust Company and of the run upon the bank; he had been sent to help liquidate the indebtedness of the bank to the Trust Company. And, fortunately, we are not required to conjecture and surmise as to who imposed this task upon him or whom he represented in the matter. In his letter of the 23rd of January addressed to Mr. Rutter he says:

> "It is by far the most stupendous task *you* have ever seen fit to put me to" (Tr. 231).

Ellis, the cashier of the Central Bank, says:

> "That the occasion for his (Buchholtz) coming was that on the beginning of the new year, on the 3rd of January, there were abnormal con-

> ditions in the bank; very heavy withdrawals, and he (Ellis) communicated with Mr. Barghoorn, and Barghoorn came down with Buchholtz on the night of the 5th of January. There had been something of a run on the bank during the first two or three days of January" (Tr. 94).

It seems from the correspondence that Buchholtz had exercised the right to make substitutions of collateral which he held as agent for the Trust Company, withdrawing such of the bills receivable of the Central Bank for that purpose as he chose (See letter of January 19th, Tr. 194); and this is in harmony with the testimony of Mr. Lemon, the assistant cashier of the Central Bank, who testified that Buchholtz had to do with the renewing of notes, securing of collateral, financial statements, and *had to do with the note pouch* in general (Tr. 82). And it was in harmony with the testimony of Mr. Ellis to the effect that Buchholtz had unrestricted access to all the securities (Tr. 95), and that he and Buchholtz jointly had charge of the Credit Department (Tr. 97).

Triplett, in his letter to Buchholtz of January 20th, says:

> "We are looking to you to keep us using black ink instead of red" (Tr. 204).

In another letter of January 9th addressed to Mr. Triplett Buchholtz urges him to write, and adds "I like to hear from headquarters" (Tr. 151). And in another letter to Triplett on the 14th he says:

"Keep writing me. It's great to hear from home" (Tr. 170).

The evidence shows that Barghoorn was trying to sell the bank and that if the sale was made Ellis would remain cashier (See Buchholtz' letter of January 18th, Tr. 190). Now it is quite clear that if the officers of the Trust Company got him the job in the Central Bank because they thought it was "a nice opportunity for a young man" to succeed Mr. Ellis as cashier, as Mr. Triplett testified, they would not at the same time be exerting themselves to the utmost to effect a sale which would prevent Mr. Buchholtz from availing himself of that "nice opportunity". And yet Mr. Buchholtz wrote to Mr. Triplett on January 7th, the second day after his arrival in Yakima in which he says:

> "We will know in a day or two if the sale matter goes through. They are going to get together tomorrow P. M. S. B. (Sikko Barghoorn) will leave for Spokane tomorrow night unless they ask that he stay, although he has given Ellis power to close deal."

Again Mr. Buchholtz, in his letter to Mr. Rutter of January 9th, says:

> *"We, of course, all hope to make the sale* and Mr. Ellis is firmly convinced it will go through, but not depending on that and the benefits to be derived immediately, we face the task of liquidation to the limit" (Italics ours) (Tr. 148).

Buchholtz, in his letter to Triplett of the 10th of January, says: that he intends to cut down the force

"if it turns out that no sale is made and I am to remain here very long" (Tr. 153). Triplett, in his letter of January 24th to Buchholtz, urged that the deal for the sale of the bank "should be hurried along as fast as possible"; and added, "If conditions go on much longer as they are now the institution will soon be in a place where no one will purchase and then it is a case of either closing its doors or getting someone to see it through" (Tr. 226).

In addition to the correspondence already considered further evidence of Buchholtz' agency for the Trust Company is found in the testimony of Mr. Hay, Bank Examiner, who testified to a conversation which took place at a meeting of the State Guaranty Board on January 22nd. The Governor had become aware of a Bradstreet report to the effect that the Central Bank had suspended payment and had requested witness to send an examiner to the Central Bank. At this meeting the Governor inquired of the witness whether an examination of the Central Bank had been made and upon receiving a negative answer insisted very forcibly that it must be done at once. Whereupon Mr. Rutter asked the Governor not to act too hastily, saying:

> "We have a man over there who is looking after things, and things are coming along very nicely" (Tr. 69-70).

Here we have one statement at least of the President of the Trust Company in harmony with the correspondence showing fully the nature of Buch-

holtz' agency and the purpose on the part of the Trust Company to forestall any interference with its liquidation of the Central Bank.

The testimony of Mr. Triplett concerning the re-employment of Buchholtz by the Trust Company after the Central Bank had been closed, should not, we think, pass unnoticed. When the Bank Examiner took charge of the Central Bank, Buchholtz removed certain paper from the bank and made affidavit that the same belonged to the Trust Company and was under his personal control. The Examiner telephoned the Trust Company and was advised that the notes in question belonged to it (Tr. 59) and were of course rightfully in Buchholtz' possession as its agent (Tr. 154). Mr. Triplett, nevertheless, testifies to the following conversation as to re-employment:

> "I called him up and he said 'the Bank is closed'. And I said to him that I supposed he was foot loose, and he said 'yes'. I said that I had a job for him; that I wanted him to take possession of all the notes and collateral we had down there and look after our interests in Yakima" (Tr. 103).

This to an admitted agent already in possession and for a long time past in the full and active performance of that very duty. "Supposed he was foot-loose; had a job for him;" Such testimony—like some of the bank's paper—"Nuf sed".

The use of the pronouns of the first and second persons in the correspondence when referring to

the two banks is of no significance, such being the customary usage even between different departments of the same institution.

This correspondence when read in the light of the surrounding circumstances, carries the firm conviction that Buchholtz was saddled with the primary responsibility of covering a $50,000 overdraft and collecting between $150,000 and $200,000 of rediscounts for the Trust Company, as the Trust Company was not *"banking on the bank's endorsement anyway"* (italics ours) (Tr. 143). Naturally he was to pursue the most effective methods to accomplish this primary object. The bank must, of course, be kept afloat until he could search the note pouch and select the best available paper to cover the overdraft, and, if possible, improve the paper already rediscounted by further selection and substitution. Ellis had not been satisfactory, but "we (The Trust Company) have great confidence in your (Buchholtz) ability to pick out the kind of paper we want" (Tr. 146). Besides, keeping the bank open would induce borrowers to pay up more readily, thus insuring the collectability of the paper (Tr. 232). Also, by continuing the bank, not with the expectation of any increase in deposits, a few goodly sized out of town collection items might be transmitted for collection, which could, under appellant's contention, be well and properly applied to the payment of its account. These benefits of keeping the bank going must, of course, be had at the least possible expense. The overhead should

be reduced and the organization made efficient; and the bank must, and actually did, thereafter function primarily for the exclusive benefit of the Trust Company. Not one thought entered Buchholtz' mind concerning ways and means of restoring public confidence and building up a good will or future business for the institution. The only interest expressed by him in its continued existence was in terms of benefit to the Trust Company. In his criticism of the management he shows where his interest lies when he says the Central Bank,

> "instead of being in its present shape ought to be buying commercial paper and keep you (Trust Company) busy supplying it * * * . But there is no use crying about spilt milk" (Tr. 153-154).

To say the least, in the proper and efficient performance of Buchholtz' admitted agency for the Trust Company in the collection of rediscounts, he was expected and required to take an active interest in the conduct of all the bank's business transactions in order that the Trust Company's interests might not be adversely affected. Knowledge acquired by him in the course of such duties must be imputed to his principal, the Trust Company.

The information of Buchholtz concerning the affairs of the Central Bank was thorough and need not be detailed here. The Trust Company through him acquired a knowledge of the transactions of the bank seldom accorded a creditor in relation to the affairs of its debtor, and thus knew full well that it was continuing the business of a hopelessly

insolvent debtor bank when it appropriated the proceeds of plaintiff's check.

13. Knowledge of Central Bank's Insolvency Communicated to Spokane.

The Trust Company was, moreover, charged with complete knowledge of the Central Bank's insolvency through its president and vice-president in charge of country banks. The letters of Buchholtz to the president (Tr. 148, 227), and his reply (Tr. 53), show a clear understanding and appreciation of the actual state of affairs, and the heavy task imposed upon Buchholtz, when shortly after his arrival at Yakima, he admonished him to "keep your head up and tail over the dash board and pray for strength".

That portion of the correspondence with the vice-president concerning the quality and value of the bank's paper has already been summarized. It does, however, contain further information of the bank's insolvency. In the letter of January 17th (Tr. 182) Triplett is fully advised of the absence of a cash reserve in the following language: "Our actual cash reserve has been running from 6% to 10%; in fact scarcely more than the cash on hand in the bank, as actual collected balances, are usually an unknown animal around here, usually offset by what our books show as overdraft with you, *the*

balance of due from sundry banks consisting of uncredited apple drafts gone hay-wire'' (italics ours).

The vice-president Triplett is, moreover, almost daily advised of the withdrawal deposits and the impossibility of making collections (Tr. 164, 169, 184, 195, 199, 215). In addition to these specific instances he is frequently advised that the "situation is still in a kind of deadlock". The correspondence imparts the information embodied in the compilations on page 84 of the Transcript relating to loss of deposits and collection of notes. The Trust Company, moreover, had full knowledge of the continuous and heavy overdraft (Tr. 87), also shown on its own books, and as reported in the correspondence, and was well aware of Buchholtz' failure to cover same with rediscounts although expressly instructed to do so.

With this complete information at hand, the true condition of affairs could not be misunderstood; a banker of Mr. Triplett's experience would not fail to draw the correct conclusion from the facts in hand. But the matter was not left for inference. On the day plaintiff's check was collected and the proceeds forwarded to the Trust Company, Buchholtz unequivocally advised him that the bank was so hopelessly insolvent that it could no longer function. He says:

> "Mr. Rutter has written to me that we can expect no increase in deposits and that the only way of liquidating the indebtedness of this bank is to collect on loans. At present practically all of the paper which I have nerve enough to send for rediscount is there, with

> the exception of a small amount in the process of collection or renewal and some miscellaneous small stuff on which we haven't the statements and information. * * * If anything substantial is accomplished (by way of collection), the best grade of paper will steadily disappear with the money going out resulting in no betterment of our reserve condition. * * * This is practically the last breath. * * * I know that you have to stretch your imagination and use a high powered microscope in looking at the favorable points of the situation. In fact, compare this institution to a man at the point of death, but with a hopeful doctor on the case who is able to detect a slight heart action" (Letter, January 21, Tr. 219).

Appellant characterizes the last remark as semi-jocose. The only attempted jocularity is in the remark that the doctor should tell the family the chances of recovery were good.

Appellant attempts to find a further ray of hope in advices from Buchholtz in this letter and another letter to Mr. Rutter of the same date (Tr. 222) to the effect that the other Yakima bankers expect "a good washing out of stuff during the next ninety days", and that there would be a chance to liquidate to the extent of more than $150,000 within that period. A cursory reading of these statements in the light of the well understood facts shows that this expectation could, if realized, in no way whatsoever aid the bank or prevent its closing. All its liquid paper belonged to the Trust Company and the National City Bank of Seattle through rediscounts; $31,000 in the hands of the National City Bank

(Tr. 89), $192,000 with the Trust Company (Tr. 85), and a further $30,000 pledged with the Trust Company its collateral to the $20,000 bills payable (Tr. 137-138, statute permitting pledge of 150% of face value), making a total of approximately $250,000 outstanding and from which the Central Bank could not possibly receive any return even if collected in full. The bank had already received and expended the proceeds of this paper. Instead of constituting an asset or possible aid to the bank, this paper carried a contingent liability for the whole amount and a fixed liability on all uncollectable items. Hence, even if a large part of this paper could have been liquidated, the bank would still face a liability from that source. Thus it appears that when Buchholtz addressed himself to this feature of the situation he was merely advising his principal, the Trust Company, what to expect of him, its *"prize man"* (Tr. 104), and trusted agent in the performance of "by far the most stupendous task you have ever seen fit to put me to". In confirmation of this Buchholtz encloses a list of loans to Mr. Rutter and states that a report on the subject to him and Mr. Tripplett is in the course of preparation.

The suggestion that the National City Bank of Seattle could be induced to release its securities and accept collateral which the Trust Company itself refused to take should be, and, as appears of record, was dismissed as idle talk. Instead of attempting such a thing we find Barghoorn prior to the closing

of the bank wiring "Herb" of the National City, advising him to hold surplus liberties to secure rediscounts and to "*protect* your interests" (italics ours) (Tr. 47).

So, here, on this 21st day of January, we find the Trust Company, and each and all of its representatives connected with the transaction were well aware of the fact that the last ray of hope for the Central Bank had gone glimmering and that further effort was futile, as is confirmed by the fact that all effort to provide further funds was then and there discontinued. Not a single new rediscount was attempted or even considered (Compilation Tr. 85; rediscounts constant at $192,000 until reduced January 25th). Nothing more but substitutions and renewals for the Trust Company. Notwithstanding any consolation talk, the "Doctor" had as a matter of fact ceased all further medication.

It remains to consider the letter of Mr. Buchholtz to Mr. Rutter, dated January 23rd, in which he renders a full report and complete analysis of the situation as of Friday Night, the 21st. To begin with he says: "The last three days, I have felt very discouraged". There had been no material change in the bank's condition within that period. He then turns his attention to the subject of deposits advising that from his arrival at Yakima on the 5th "deposits dropped from $482,000 to $430,000 Friday night" (January 21st). As against this loss he reports that during his seventeen days presence with the bank "we have collected a cash

total of $15,259.08 and the enclosed adding machine slip will indicate that about $10,000 of this consisted of small items and that very little large amounts have come in and I don't expect anything large for ten days more", thus revealing an average daily collection of less than $1000.00 from a total of more than $550,000.00 bills receivable (Tr. 96), a most discouraging showing for one of our "right hand men" who had been repeatedly urged and instructed to liquidate to the limit. Thus it is obvious that none of the paper was liquid and that the best of it had become slow; but that is not the worst of it, continuing, "the large items when they do come in will, of course, go on rediscounts with no improvements in our reserve", hence providing no relief for the bank. And to show that his discouragement is not sudden, but a wearing of the "paralytic circumstances", he further says "the past week the shrinkage (of deposits) has not been bad and all of a regular nature". Referring to his efforts to cover the overdrafts it is said "I am making every effort to better that condition and as stated am nearly at the end of the rope unless one or two things can be done", and then suggests the release of Liberty Bonds in Seattle and the rediscounting of $16,000.00 worth of Barghoorn's notes with Trust Company and that if neither of these arrangements is possible

> "there is only one more avenue of relief and that is to whip up some of the stuff you are holding as collateral into rediscount and substitute a poorer class of security. * * * In

> fact, it sifts itself down to whether you desire by all means to keep this institution open * * * depending more or less on Mr. Barghoorn's personal credit, or whether you have set a limit as to how far you will go".

Neither of the modes of relief suggested were within the realm of possibility. He then states the grim necessities of the immediate future if the bank is to be kept open and declares the bank's paper will continue to deteriorate enormously. He then turns to the other side of the situation and discusses the value of the bank as an institution for future business and "earning power to charge off *bad paper*". Here we have a direct written acknowledgment of the one fact which appellant says was not known in relation to the bank's insolvency.

He then continues by pointing out how with proper management of the bank the indebtedness of the Trust Company could eventually be worked out to within reasonable bounds and made into a valuable account. After referring to the draft covering proceeds of plaintiff's check he finishes with the postscript that a further advance of $50,000 would keep the bank open and would in his "positive opinion result in a much shorter time for the Trust Company to get their money back than to close it up".

These remarks do not, as appellant contends, show any faith in the solvency of the bank; on the contrary such insolvency is fully stated and frankly

confessed. Buchholtz is merely urging Rutter to finish what he started when he came to Yakima, that is, to continue the bank regardless of solvency as the lesser of two evils. Although "discouraged" and suffering from the suspense of "waiting for something to move and bring in cash"; although it is "by far the most stupendous task you have ever seen fit to put me to; I appreciate your confidence and am not weakening". In other words, Buchholtz was still game if Rutter wanted to go the limit.

Appellant's brief seeks to brighten this utter financial darkness with four little beams of hope (Brief 84). "The proposed sale", which appellant, not then but now, takes so seriously to justify withholding plaintiff's money. Just how a transfer of stock would better the financial condition of the bank is not made plain, except upon the theory that the Trust Company could use new depositors' money to square its accounts instead of being compelled to resort to a mere collection item, and that this was the theory is so stated by Buchholtz (Tr. page 190), always looking out for the Trust Company. Next, "The expected crop movement of February and March". With all the slow and liquid paper, if any, in the Trust Company's hands, the crop movement was of no interest to the bank. Next, "A promised (by whom?) deposit of $50,000 of county funds in February". Not a chance, because Section 5563, Remington Comp. Statutes requires a deposit of good collateral, as everybody well knew.

Finally "The continued assistance of the Trust Company". Generous to a fault when dealing with country banks (Brief I, p. 9), but not quite an eleemosynary institution in its respect for collection items. No such hopes were seriously entertained. Thus do we conclude, from all the foregoing that on and before the 21st day of January, 1921, the Central Bank was well and fully aware of its hopeless insolvency through both Ellis, its official cashier and Buchholtz, its actual manager in full and complete control that the Trust Company was on and before the following day fully informed of such insolvency through the knowledge of its agent Buchholtz and the knowledge of its president and vice-president, and that as a result appellant is precluded from successfully disputing plaintiff's title to the proceeds of collection here involved. We shall, therefore, next consider whether appellant received such proceeds with knowledge of plaintiff's rights.

14. Appellant Received the Proceeds of Collection With Full Knowledge of Plaintiff's Rights.

The proofs on this point are clear and convincing. Plaintiff's check was deposited in Seattle on the 19th and undoubtedly reached the Central Bank at Yakima on the 20th, too late for the clearings, which were closed during the morning, and consequently was held until the morning of the 21st (Tr. 35, 36). Buchholtz saw the cash letter from Seattle also

plaintiff's check and discussed the matter with Ellis. It was the practice for him and Ellis to consult each other concerning both the incoming and outgoing cash items and clearings. The letter was discussed in the usual manner and probably more at length owing to its unusual size (Ellis Tr. 96). He also discussed the cash letter and plaintiff's check with Lemon, assistant cashier (Tr. 81). On the day the bank closed Buchholtz told the witness Miner that he had handled plaintiff's check himself (Tr. 72). Buchholtz denies having seen the cash letter but admits on cross-examination that Lemon explained the matter to him (Tr. 135). On January 23rd Buchholtz wrote Rutter saying, "Yesterday we mailed a $51,000 draft on you to the Seattle National Bank covering a large letter of *items on other local banks,* the net of which has been remitted to you" (italics ours) (Tr. 231). Unquestionably Buchholtz acquainted himself with this transaction in all its details. Obviously he saw the cash letter requesting collection and *returns,* and likewise saw and remembered that it contained plaintiff's check drawn on another local bank. He says himself that he saw the draft register and from this of course was well aware of the fact that the matter was being treated as a cash and not a *credit* transaction. So much for the knowledge of Buchholtz and Rutter. What about Triplett?

As to Triplett's knowledge, the witness Miner testifies that Buchholtz told him that he had discussed the cash remittance letter and draft with

the Trust Company over the telephone and had likewise informed the Trust Company that the cash remittance made to it on the 21st by the Central Bank was the proceeds of such collection (Tr. 72-73). In confirmation of this testimony the telephone records at Yakima were produced showing a call from Buchholtz to Triplett and a twelve minute conversation on the 20th, the day plaintiff's check arrived at the Central Bank. Again on the 22nd, the day the proceeds of collection and Buchholtz' letter of the 21st arrived at the Trust Company, Triplett called and talked to Buchholtz. Triplett admits actual knowledge of the remittance on Monday morning, January 24th, when he inspected the ledger showing receipt of the $48,000 on Saturday, the 22nd (Tr. 111), but insists that he had absolutely no further knowledge on the subject at that time, and was first fully advised on the 25th. He does, however, have before him, first, Buchholtz' letter of the 21st telling him the bank is wholly without cash and begging to "hold what few pennies we might collect on your collateral notes" (Tr. 221), and, second, his own bank ledger telling him that on the same day this letter was written the bank had remitted the large round sum of $48,000. He insists that these two absolutely contradictory facts constituted the sum total of his knowledge on the subject. If such be the truth, he must have been in a great state of mental uncertainty as to whether to believe his friend Buchholtz or the figures in the ledger. Yet he would have us believe that he did

not then attempt to clear up the situation and that he did not wake up to the fact that the $48,000 did not belong to the bank until he received Buchholtz' letter referring to "*that* big draft" (Tr. 232). It is difficult to believe that he went through the day in any such state of mind. Like any other intelligent banker, he would not have acted without a clear understanding of the facts. He undoubtedly knew the true state of affairs from the beginning. He went by the ledger on his way to the executive meeting merely to check up the balance on hand that morning, in order that there might be no guess work in the discussion of the matter there. As a result of that discussion he immediately replied to Buchholtz' letter advising him that "our executive committee feel that you should *immediately* get in touch with Herb" (Tr. 225), for the purpose of providing sufficient funds to enable the bank to take its "last breath" (Tr. 221.) With the $48,000 remittance fresh in mind he further answers Buchholtz, without the slightest reference thereto, telling him quite plainly that the Central Bank cannot have those few pennies which might be collected; "we don't want to get into the position where we will ultimately lose anything". "The deal for the sale of the bank should be hurried along as fast as possible, so that our mutual friend, Mr. Barghoorn will get out without greater loss than he will now sustain"; in other words, get out from under and let the other fellow hold the bag; "If conditions go on much longer as they are now the institution

will soon be in a place where no one will purchase and then it is a case of either closing its doors or getting someone to see it through". Thus does he write without a single reference or question as to the ownership of the large remittance, and does so obviously not from indifference or lack of interest but for the apparent reason that he is then fully advised of the true nature of the remittance. Inquiry was unnecessary; he was in full possession of all the facts. The telephone had served its purpose.

Triplett admits the bank's affairs were discussed over the telephone; "he kept us informed by letter and telephone"; but denies discussion of this matter, saying, "we would not discuss any important matters over the phone which might get to the public and be detrimental to the bank"; "matters of importance that we did not object to anyone hearing would be discussed over the telephone" (Tr. 113-114). It is not quite clear how the information concerning the collection of plaintiff's check, standing alone, would be detrimental to the Central Bank. It could not possibly be so, unless such discussion should unfold a purpose to dishonor the draft. The letters, moreover, contradict him again, for instance, it is written "I tried to call you tonight but couldn't get you. Nothing in particular only I was anxious to know what had been done on the Liberty Bond matter and substitution of notes as collateral; also to give you the news of our raise in deposits today of $13,000 with $9000 in clearings for morning" (Tr. 154). Also, in a letter

to Mr. Rutter, on January 9th, three days after Buchholtz's arrival he writes, *"As already advised,* we all feel that the withdrawals have terminated" (Tr. 146). The letters show no such prior communication, calling for the conclusion that the matter was discussed by telephone.

Whatever may be the fact in this connection, the record shows conclusively that Triplett acted throughout the day on the assumption that the remittance did not belong to the Central Bank. Hence, the source of his information is not really material. The point is that Triplett knew the $48,000 had been remitted for a particular purpose and that the Central Bank had no right to use it except for that particular purpose, else it would not have been begging for pennies to keep it going.

Mr. Rutter says that he did not receive Buchholtz's letter of the 23rd until the morning of the 25th. That letter was written on Sunday and it is a singular thing that this particular letter should have been so delayed and not received until after the $45,000 draft had been presented and paid at Tacoma.

Thus, the record shows that the Trust Company, through its agent, Buchholtz, its vice president, Triplett, and its president, Rutter, was in actual touch with the collection of plaintiff's check from the time it reached the hands of the Central Bank until it dishonored the draft. Full knowledge was completely established.

Facts much less convincing than those in suit have supported a recovery. *Union Stockyards National Bank v. Gillespie,* 137 U. S. 411. There the bank was held to have notice of the plaintiff's rights to money deposited by an insolvent factor on far less conclusive testimony than that presented here. We invite the court's special attention to this case, because it is, in our opinion, conclusive.

See also,

Grandison v. First National Bank of Commerce, 231 Fed. 800;

Union Stockyards National Bank v. Moore, 79 Fed. (8th C. C. A.) 705;

Arnold v. San Ramon Bank, 194 Pac. (Cal.) 1012; 13 A. L. R. 320.

We call particular attention to the annotation of this case in the volume last cited, and especially to Subdivision IV, page 334, where the authorities are reviewed at length;

The dual agency of Buchholtz does not affect or limit the Trust Company's knowledge;

Bassett v. Evans, 253 Fed. 532. (This was a case of dual agency somewhat like the case at bar.)

Bergenthal v. Security State Bank, 112 N. W. 892. (This also is a case where an agent was acting in dual capacity).

15. The Proceeds of Plaintiff's Check Were Fully Identified and Traced into the Hands of the Defendant Trust Company.

The facts are these: Upon the receipt of plaintiff's check the Central Bank presented it for collection by its clearing agent, the Yakima Valley Bank, through the clearing house. It presented at the same time the other collection items which it had received from the Seattle National Bank, along with plaintiff's check with like instructions, amounting to $51,000. It also delivered at the same time to its agent, the Yakima Valley Bank for clearance local checks on local banks, amounting to $7800.00, asking a total of items presented at the clearing house by the Yakima Valley Bank for the Central Bank of $59,000.00.

There was on that morning presented through the clearing house by the various other Yakima Banks items against the Central Bank amounting to $9,000.00. The balance of clearings in favor of the Central Bank was $50,000 (see testimony of Lemon, record pp. 36 and 37). It appears, therefore, that the local checks presented by the Central Bank were not sufficient in amount to offset the local checks which were presented against it, by approximately $2,000.00. As there is no evidence that the Central Bank held the $7,000.00 of checks in any trust capacity, it will be presumed, as the undoubted fact was, that it was the owner of these checks. The law, therefore, will apply that $7,000.00 toward the payment in the clearance of the $9,000.00

of checks presented against the Central Bank,—this, upon the familiar rule that a trustee will be presumed to have used his own funds in such a case, rather than the trust funds.

Raynor v. Scandinavian Amer. Bk., 210 Pac. 499, 505;

Spokane Co. v. First Natl. Bk. of Spokane, 68 Fed. 979, 981 (C. C. A. 9th Circuit);

Empire State Surety Company v. Carroll Co., 194 Fed. 593, 605;

Board of Com. v. Patterson, 149 Fed. 229, 232.

This left approximately $2000 to be paid out of the trust items of $50,000 and left $48,000.00, round numbers, of the trust fund unimpaired. The Central Bank received from the Valley Bank $48,000 in the form of two drafts, leaving a small balance with the Valley Bank. These two drafts were transmitted to the Trust Company, collected, and the proceeds retained. The identification and tracing is perfect. Buchholtz in his letter to Rutter had no difficulty in making the identification. In speaking of the items including plaintiff's check he says, "The net of which has been remitted to you" (Tr. 231).

The amount of plaintiff's check was approximately $48,000, and the amount received in drafts by the Central Bank was also $48,000, but the whole amount of the trust items presented by the Central Bank was approximately $51,000.00, $3000.00, or 1/17th of which was lost in the clearings. Thus plaintiff thereby lost 1/17th of the total amount of its check and for that reason was entitled to a judgment for

only 16/17ths of the total amount of its check and judgment for that amount was entered accordingly.

The identification and tracing of the trust funds in suit is held sufficient by the following authorities:

Cragie v. Hadley, 99 N. Y. 131. (This case is cited with approval by the Supreme Court of Washington in the *Blake* case, 12 Wash. 619, cited by the appellant).

Foster v. Klinker, 35 Pac. Rep. 470 (Wyo.);

Raynor v. Scandinavian American Bank, 210 Pac. Rep. (Wash.) 499.

It is claimed by the defendant, the Trust Company, that it is incumbent upon the plaintiff to show that the funds in the hands of the trustee were augmented, and cites a number of authorities in support of its contention.

The question of augmentation arises only in cases where the plaintiff is seeking to establish a preference as against general creditors by impressing a trust upon the general funds of a receiver of an insolvent concern. The question therefore does not even arise in the case at bar, for the plaintiff is not seeking to establish a trust upon the funds in the hands of the receiver of the insolvent bank. The funds that we are seeking to reach did not come into the possession of the receiver. They had been transmitted to the defendant Trust Company before the receiver took charge.

But if such proceeds had come into the hands of the receiver they would have augumented the funds

in his hands and the plaintiff could have pursued them. The requirement that it must be shown that the assets coming into the hands of the receiver were augmented by the claimed trust funds, means nothing more than that it must be proved that he received the trust funds. The fact that the receiver would be liable in an action of debt to pay the plaintiff's claim if the trust relation was waived, does not alter the fact that the funds in the receiver's hands were augmented. It is only necessary to show that the gross assets in the hands of the receiver, not the net assets, have been augmented. The appellant's argument on this point is so fully and satisfactorily answered in the *Raynor* case (210 Pac. Rep. 499) that it is not necessary to cite further authority.

In that case the Supreme Court of Washington flatly overruled the *Spiropolas* case so strongly relied upon by the appellant in so far as the latter case held to the contrary. This point is fully covered also by the authorities cited under section 6 of this argument.

16. Appellant's Lack of Good Faith.

The appellant makes an extended argument from pages 9 to 39 of its brief complaining of the announcement by the court set out on page 10 of the brief, wherein the trial court stated that under the circumstances disclosed by this record one bank ought not to be permitted to nurse another along until it finds a favorable opportunity to seize the money of some innocent third party to square its ac-

counts and then abandon its nursling to the tender mercies of the Bank Examiners and receivers; that such a course is forbidden by sound law and good morals. The trial court saw and heard the witnesses. He announced in his memorandum report that the proofs sustained all the allegations of complaint, except in one respect, i. e., that the plaintiff was entitled to recover the full amount (Record page 20). That he correctly characterized the conduct of the Trust Company, is fully sustained by this record. It must all be read with care to be fully appreciated. But the conduct of the Trust Company, its objects and its purposes, are fairly indicated by Triplett himself in his letter to Buchholtz written on the very day that the Central Bank received our check, when he said that Buchholtz should devote himself to the business "of *non-borrowers who will have crops and whose deposits can be used to liquidate indebtedness*" (italics ours) (Record p. 213).

After hearing and seeing the witnesses and reading the correspondence, the trial Judge could not come to any other conclusion.

The judgment of the trial court should be affirmed.

Dated, San Francisco,
May 7, 1923.

Respectfully submitted,
WALTER SHELTON,
JOHN H. POWELL,
PETERS & POWELL,
Solicitors for Appellee.

IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SPOKANE & EASTERN TRUST COMPANY,

Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY,

Appellee.

No. 3983

Appeal from District Court, Eastern District of Washington

APPELLANT'S REPLY BRIEF

F. H. GRAVES
W. G. GRAVES
B. H. KIZER,
Spokane, Washington
Solicitors for Appellant.

EMPIRE-PACIFIC PRINTING CO., SPOKANE

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I.

The Primary Question for Decision.

Plaintiff's counsel asserted in oral argument that there was no question of law involved in this case. That depends upon whether the case is decided upon suspicion and denunciation, as counsel would have it, or whether it is decided by the application of settled principles of law to the facts established by the evidence. If the latter, there lies at the threshold of the case, beyond which there is no passing until the question is decided, the question whether the Central Bank was plaintiff's trustee or its debtor with respect to the proceeds of the collection involved. If the Central Bank was merely plaintiff's debtor, certainly there can be no recovery in this case, for in that event no trust fund came into the hands of the Trust Company, and no matter what the relations between the Central Bank and the Trust Company, nor the circumstances under which the money was received by the Trust Company, plaintiff cannot recover it.

To sustain its claim that the Central Bank was plaintiff's trustee of the proceeds of the collection and not its debtor therefor, it is first said that by virtue of an express agreement between the two the title to the check and its proceeds remained in plaintiff. The statement is unsustainable. There was no express agreement with respect to the manner of the collection, or regarding the title to the check and its proceeds, and the question of where that title was at

the time of the insolvency of the Central Bank depends upon the custom of banks in making collections such as that here involved. These are the material facts: Plaintiff deposited the check with the Seattle National Bank, its Seattle banker, just as it would money, receiving credit therefor. Under the fundamental law governing such deposits, plaintiff thereby parted with its title to the check and vested it in the Seattle National Bank. The deposit slip, however, contained a stipulation that out of town items would be collected through agents, for whose defaults the Seattle National Bank assumed no responsibility, and that if there was a failure to receive the proceeds of the collection due to the default of any sub-agent, then the items previously credited would be charged back to the depositor's account (Tr., 33). Plaintiff knew, therefore, not only from the deposit slip but from the custom of banks, of which it was charged with notice, *Bowman v. Bank,* 9 Wash., 614, that the check would be sent to another bank for collection and the collection made in accordance with banking customs. If it did not desire the collection to be made in that manner, it should have made some express agreement to the contrary. *Hallam v. Tillinghast,* 19 Wash., 20. It made no such agreement and did nothing but deposit the check as a general deposit to its credit, and so must be held to have intended that the check should be collected in accordance with the usual custom. The Seattle National Bank made its Yakima collections through the Central Bank. It therefore placed plaintiff's check with a number of other checks

on Yakima banks which it held and sent them all to the Central Bank. It was intended that the collection should be made in the customary manner, for it gave no special direction respecting the matter. The checks bore the "regular endorsement stamp for collection of out of town items," were enclosed in the "regular cash remittance letter," and this letter, as its face shows, was a form letter used in all such cases (Tr., 33-34). When the Central Bank received the checks it proceeded to collect them in the usual manner. As it was not a member of the Yakima Clearing House, collections for and against it were made through the Yakima Valley Bank. The procedure, as illustrated by the business of the 21st, the day the check in question was collected, was as follows: The Central Bank took the checks it had received from the Seattle bank, placed them with a number of other checks drawn on Yakima banks which it held for collection, the total of which aggregated over $58,000, and deposited them with the Yakima Valley Bank, receiving credit therefor just as though a general deposit of money had been made, and of course establishing between the Central Bank and the Yakima Valley Bank the same relation with respect to the checks that is established between any depositor and any bank when he makes a general deposit with the bank. The checks deposited were all collected by the Yakima Valley Bank on the 21st. On the same day, however, checks against the Central Bank amounting to some $9,000 were presented to and paid by the Yakima Valley Bank. The result of the day's trans-

actions was that out of its deposit of $58,000 in the morning, the Central Bank had a credit of $49,500 remaining with the Yakima Valley Bank in the evening, the remainder of the deposit having been used in paying the debts of the Central Bank, *i. e.*, checks drawn upon it and presented for payment to the Yakima Valley Bank (Tr., 36-40). The Central Bank then withdrew $48,000 of this deposit in the form of two drafts, one on a Tacoma bank and one on a Spokane bank, leaving a deposit of $1,500 with the Yakima Valley Bank. It sent the drafts, together with some small items derived from other sources, to the Trust Company for credit. It then drew a draft upon the Trust Company for $51,000, the total amount of the checks collected for the Seattle National Bank, and sent the draft to that bank. The latter accepted the draft without question and in due course presented it for payment to the Trust Company. No objection was made to the manner of collection until payment of the draft was refused.

While the matter is not relevant to the legal question involved, we digress to reply to the insinuation made in brief and oral argument that had the usual and proper course of business been observed, the $48,000 drafts would have been sent directly to the Seattle bank, accompanied by a sufficient amount in other funds to cover the amount of the checks collected, and that it was unusual to send them to the Trust Company for credit and to draw a draft upon it in settlement of such collections. The falsity

of the insinuation is established by the record. Lemon, an officer of the Central Bank and a witness for plaintiff, testified that the manner of making the collection and remitting therefor was in accordance with bank custom; the custom prevailing in banks generally, the custom universally followed in dealings between the Seattle National Bank and the Central Bank (Tr., 41-42). The Central Bank carried no account with the Seattle National Bank. It did have an account with the National City Bank of Seattle, but it was not such an active account as that with the Trust Company. Ellis, cashier of the Central Bank, and also a witness for plaintiff, testified that the $48,000 drafts were sent to the Trust Company for credit because "it was the principal and drawing correspondent, and the only time the Central Bank didn't use them in the ordinary course of business was in the extreme East or in California"; that sending the drafts to the Trust Company for credit and drawing upon it in settlement of the collections was in the regular and orderly course of business and as business had always theretofore been transacted between the Seattle National Bank and the Central Bank (Tr., 96-98). Furthermore, it was proven that between the 14th and the 27th of January—the collection for plaintiff was made on the 21st—the Central Bank made collections for the Seattle National Bank amounting to about $100,000, and that in every case settlement therefor was made by drafts drawn upon the Trust Company, and that these transactions were typical of similar transactions occurring for some months prev-

ious (Tr., 140-141). Inasmuch as none of this evidence is disputed or questioned, counsel are scarcely frank in insinuating that the particular transaction was out of the ordinary and improper.

Now as it was intended that the collection should be made in accordance with the banking custom, in the manner in which all out of town collections are made by all banks, and as it was so made, it must be held that when the collection was made the Central Bank took title to the proceeds and was plaintiff's debtor therefor if the cases of *Bowman v. Bank,* 9 Wash,, 614, and *Hallam v. Tillinghast,* 19 Wash., 20, are followed. Those cases are not distinguishable from this, and counsel virtually so admit, seeking to avoid their effect merely by the claim that they should not be followed. But they must be followed unless well settled principles regarding the weight to be given state decisions in Federal courts in cases like this are disregarded. Plaintiff is domiciled and engaged in business in Washington. The other parties are citizens of that State. The transaction involved originated and was completed within that State. Moreover, Washington has a banking code under which possession of the assets and settlement of the affairs of insolvent banks are confided entirely to the State Banking Department. That Department, guided by the decisions of the courts, must pass upon the conflicting claims of general creditors and of those who present claims as *cestuis que trustent.* If this Court should in this case establish a rule contrary to that declared

in the *Bowman* and *Hallam Cases* the Banking Department must, in the future, fit its decisions upon such claims to the amount involved and the citizenship of the claimant. If these be such that the Federal Courts will have jurisdiction of the controversy, the Department would need follow the rule declared by this Court; otherwise it would be required to follow the rule of the *Bowman* and *Hallam Cases*. Such a situation ought not, of course, to be permitted. This Court has unvaryingly held that where a transaction was local to a given state, and the state courts had determined what the effect of the transaction was, their decision ought to be followed by the Federal courts, albeit the question was one of general rather than local law, in order that any unseemly conflict in the decisions of the courts should be avoided, unless, of course, the decision of the state courts was opposed to both reason and authority. *Old Colony Trust Co. v. Tacoma,* 230 Fed., 389; *Columbia Digger Co. v. Sparks,* 227 Fed., 780; *American Surety Co. v. Bank,* 254 Fed., 54. Its rulings in that respect conform to the decisions of the Supreme Court. *Union National Bank v. Bank of Kansas City,* 136 U. S., 233; *Ethridge v. Sperry,* 139 U. S., 267; *Bamberger v. Schoolfield,* 160 U. S., 149. Furthermore, there is presented a question of title to property within the State of Washington. Plaintiff asserts that the title to the check and its proceeds remained with it and that therefore the Central Bank was its trustee. The defendant asserts that title to the check and its proceeds passed to the Central Bank, and that therefore it was

merely plaintiff's debtor. Quite obviously the Court is required to say whether what occurred was sufficient to pass the title to personal property, and it is certainly beyond dispute that where a question of the transfer of title to property is involved the decisions of the courts of the state where the transaction occurred are controlling. *Lloyd v. Fulton,* 91 U. S., 479; *Dooley v. Pease,* 180 U. S., 126; *Bryant v. Swofford Bros.,* 214 U. S., 279. This Court has held that when the question was whether a chattel mortgage was fraudulent and void as to attaching creditors, it would follow the decisions of the courts of the state where the property was situated in determining the question. *Scandinavian-American Bank v. Sabin,* 227 Fed., 579. It is universally held in the Federal Courts that where questions involving property rights are involved, *e. g.,* the validity and extent of a pledge, the rights of a conditional sale vendor, the validity of trust receipts as security, etc., etc., they are to be determined in accordance with the decisions of the courts of the state where the property was situated. *Atherton v. Beaman,* 264 Fed., 878; *First Nat'l Bank v. Bank of Waynesboro,* 262 Fed., 754; *In re Richheimer,* 221 Fed., 16; *In re Bettman-Johnson Co.,* 250 Fed., 657.

But disregard, if you please, the decisions of the Supreme Court of the State. The question is controlled by *Commercial Bank v. Armstrong,* 148 U. S., 50. Plaintiff's counsel make an involved argument in attempted distinguishment of that case which we are unable to follow. We do not feel it necessary to over-

exert ourselves in endeavoring to do so because the case is simple and its principle beyond confusion. It was there squarely held that when one bank sent commercial paper: checks, darfts, etc., to another bank for collection, the relation between the two was that of principal and agent until the collection was made, but that as soon as the collecton was made, title to the proceeds was in the collecting bank and the relation between them changed from that of principal and agent to that of creditor and debtor. The case differs from the present in only one particular: that here the remittance for the collections was expected to be made as soon as the collections were effected, while in the cited case it was agreed that the proceeds of the collections might be held for ten days before remitting. That does not affect the principle involved. If by the custom of banks the collecting bank is expected or permitted to mingle the proceeds of a collection with its own funds and make remittances from the commingled fund instead of transmitting the very money collected to the owner of the collection, then the relation arising when the collection is made is not that of trustee and *cestui que trust,* but of debtor and creditor. The decisive factor is the exercise of ownership by the collecting bank over the proceeds of the collection and the mingling of the funds collected with its own funds. If this is expected or permitted, then the collecting bank is a debtor for the proceeds of the collection, but not a trustee thereof. Now, whether the time that the collecting bank exercises ownership over the money collected and holds that

money as a part of its own funds is a matter of hours or of days is immaterial. The Supreme Court said in the *Commercial Bank Case* that "the fact that the intervals between the dates for remitting were brief, is immaterial. The principle is the same as if the (collecting bank) was to remit only once every six months." Every argument that can be made for distinguishing the *Commercial Bank Case* from the present was made and answered in *First Nat'l Bank v. Davis* (N. C.), 19 S. E., 280, and upon the reasoning contained in that opinion we are content to rest.

But one word more respecting the effect of the state decisions. In *Sim v. Edenborn*, 242 U. S., 131, suit was brought to avoid and rescind a contract claimed to have been induced by misrepresentation. It was held below that the complainant could not recover because he had not offered to restore the *status quo*, the Circuit Court of Appeals declining to follow the decisions of the state court that the complainant in such a case could recover without offering restoration. The Supreme Court reversed the ruling of the Circuit Court of Appeals, saying that the decision of the state court upon such a question ought to have been followed where the transaction occurred in the state, at least where the conclusions of the state court "are not in direct conflict with any declared views of this court and some expressions in our former opinions tend to support them." Whether or no the *Commercial Bank Case* is technically distinguishable from the present case, it is certainly beyond dispute

that the decisions in the *Commercial Bank Case* and in the *Bowman* and *Hallam Cases* are closely akin, and that so far from the decision in the *Commercial Bank Case* being in conflict with the decisions in the *Bowman* and *Hallam Cases* there is very much in that case tending to support the conclusions of the other cases. Inasmuch as a rule of property is involved, and the question is whether under the circumstances the title to personal property in the State of Washington passed from plaintiff to the Central Bank, the decisions of the Washington courts should be followed.

It is said in plaintiff's brief that the Washington decisions cited are opposed to the weight of authority, and a number of decisions are cited to sustain the assertion. Space does not permit that we remark upon each cited case, although after reading them it will be seen that all, or substantially all, are distinguishable. We take for remark only the decision of this court in *Titlow v. McCormick*, 236 Fed., 209. The manner in which counsel refer to the transaction involved in that case gives the impression that it was similar to the transaction involved here. The fact is to the contrary. In that case the owner of warrants issued by a school district left them with a bank for collection. There was no general deposit of the warrants, and the transaction plainly involved merely a special deposit, and under the fundamental law governing deposits title to such a deposit does not pass to the bank. Neither was it a case where a question of the custom of banks was involved; such a ques-

tion as is presented in the present case and in every case where one bank sends commercial paper, checks, drafts, etc., to another bank for presentation and collection. Under these circumstances it is readily to be seen why it was that the *Commercial Bank Case* was neither cited by counsel nor referred to by the Court. The *Commercial Bank Case* turns, as a reading of the opinion at once discloses, upon the custom of banks in making collections of commercial paper, and it is upon that same custom that the decisions of the Supreme Court of Washington turn. The *Titlow Case* is plainly irrelevant to any question involved in this case. A reading of the remainder of the cases cited by counsel will show them to be equally irrelevant.

Some importance is sought to be attached to the fact that no debit and credit entries were made upon the books of either the Seattle National Bank or the Central Bank respecting the collection transaction, memoranda merely being kept to show that the collections had been sent and received and showing the course thereof. That that is an immaterial circumstance was held in *First National Bank v. Davis,* 19 S. E., 280, where it was said that "the manner of keeping the account was immaterial—a mere matter of bookkeeping." The important thing, as there held, was that it was understood that the collecting bank could and would transact the business as it did, treating the checks, drafts, etc. sent it as its own in its daily transactions. There can be no question of the manner in which the Central Bank treated these checks. They were deposited as its prop-

erty with the Yakima Valley Bank and their proceeds were used in paying its debts; not only in paying the $9,000 on checks which were presented against it through the Clearing House on the 21st, but in the payment of prior drafts drawn upon the Trust Company. Under the custom of banks there could be no doubt that it was expected that it might do so.

As a makeweight it is suggested that unless a collecting bank receives actual money for a collection it remains trustee of the sender. The notion is fantastic. Banks make payments from one to the other by checks or drafts, not coin. Under the decisions in the *Commercial Bank, Bowman* and *Hallam Cases,* all that is necessary to transmute the relation between the sender and the collector from that of principal and agent to that of creditor and debtor, is that the collector shall have received money or its representative in payment of the collection, and has thereupon mingled what is received with its general funds and used it as its own. Plaintiff's check, merged with a number of other checks, was deposited by the Central Bank to its credit with the Yakima Valley Bank. From the proceeds of all those checks, an indivisible mass, was paid $9,000 in debts of the Central Bank: checks drawn upon it and presented to the Yakima Valley Bank. Of the remainder, $1,500 was left on deposit with the Yakima Valley Bank, and presumably used in paying debts of the Central Bank, while $48,000 was sent to the Trust Company for general deposit to the credit of the Central Bank. That money was used to extinguish an ex-

isting overdraft of the Central Bank, to pay drafts drawn by it, and, finally, to pay a part of its debt to the Trust Company. Obviously there was a collection of plaintiff's check which, to look no further than the *Commercial Bank Case,* changed the relation of principal and agent to that of creditor and debtor. There is no hint to the contrary in the cases cited by plaintiff.

But it is said that in any event the insolvency of the Central Bank when it made the collection forbids that it be accounted plaintiff's debtor, and requires that it be held as trustee.

Both law and facts are distorted in plaintiff's presentation of this point. It is said, in effect, that if the Central Bank was in fact insolvent, and if its officers suspected that it was so, or by the exercise of care and good judgment might have known that such was its condition, such fraud existed as would warrant holding it as plaintiff's trustee. The law is not so. Though the Central Bank was insolvent, and was known by its officers to be so, yet if they in good faith believed or hoped that it might surmount its difficulties and continue in business for some indefinite period, there was no fraud and no ground for holding it as plaintiff's trustee. "There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided." Where such is the case fraud cannot be imputed.

McDonald v. Chemical Nat. Bank, 174 U. S., 610. "A trader * * may be struggling in the straits of financial embarrassment, but with an honest hope of weathering the financial storm and of being eventually solvent." The transactions of banks under such conditions are honest, "and the fact that their expectations were unrealized, and their hopes not well founded, would not fasten upon them a fraud that would vitiate their business transactions." *Quin v. Earle,* 95 Fed., 728. Now, what caused the failure of the Central Bank? Counsel portray it as due to a loss of public confidence, resulting in a run upon it. That is not so. The evidence is undisputed that it was caused by the deflation period, the steady withdrawal of deposits resulting therefrom, and inadequacy of liquid assets upon which money could be immediately realized. True, Ellis says there was "something of a run on the bank during the first two or three days of January" (Tr., 94). But disaster did not result therefrom. Whatever of flurry there was passed, and conditions became again as nearly normal as they could be said to be during the deflation period. Thus, from November, 1920, to the 3d January, 1921, there was a loss in deposits of $152,000. From the 3d to the 21st the loss was $83,000, and this loss was not heavy nor constant, being attended with fluctuations and never exceeding a few thousands on any day (Tr., 83-84). The State bank examiner testified that the peak of the deflation period was reached about the time of the failure of the Central Bank; that while it was in progress deposits dropped, pressure for cash became acute, and

banks became interlocked with each other for exchange and cash; that the larger banks were dependent upon the Federal Reserve system and the smaller banks upon the larger (Tr., 60). It may be remarked that the Trust Company lost about $5,000,000 in deposits during 1920, and $1,500,000 during January, 1921 (Tr., 105). It is apparent, then, that during January, 1921, whether any bank could be said to be solvent depended, first, on how long the deflation period would continue with resultant withdrawals of deposits, and, second, upon the liquidity of its assets. The first, no man could foretell; the second was a matter of individual opinion, which would vary according to the extent of the information of the individual, and with his inclination to optimism or pessimism.

Now, when a bank's failure is not due to over-loans, or to concealed peculation or kindred dishonesty—nothing of which is present in this case—but to a gradual shrinkage of deposits and inability of borrowers to pay because there is no market for their produce, the question of solvency or insolvency must in the nature of things be a doubtful one down to its last moments. The State bank examiner examined the Central Bank in June, 1920, six months before its failure. Apparently he then considered it to be in good condition, for nothing to the contrary is hinted. In December the examiner requested Barghoorn to make a change in the management. This was not because the Bank was thought to be in an unsafe condition, but because Ellis was not considered a good

banker, and it was thought that a firmer man, better acquainted with loans and of a more conservative disposition, ought to be in charge during the deflation period (Tr., 62-65). To this may be added that the examiner saw no reason for taking over the Central Bank on the 26th, the day before it closed, and that he believed, even in the light of subsequent events, that with outside assistance of $100,000 it would have survived (Tr., 63-64, 66).

Turning to the officers of the bank, there is no pretense that Mr. Barghoorn was well or at all informed concerning the character of the Bank's assets. That he knew the Bank was contending with a cash shortage may be admitted, but there is no reasonable ground for urging that he knew the Bank's condition to be even serious. The bank examiner, who went with Mr. Barghoorn from Spokane to Yakima on the night of the 25th, after it was known that payment of the $51,000 draft would be refused, testified that he "believed Barghoorn had no suspicion whatever that the bank was going to have to close, that while he was cognizant of the danger of a cash shortage, he didn't question the worth of his assets" (Tr., 64). Under redirect examination by plaintiff's counsel he testified that Barghoorn's attitude "was more that of fearing a collapse of the credit of the bank and an apprehension over being able to provide cash for the situation, rather than a fear of the intrinsic worth of his assets" (Tr., 65-66).

So far as Ellis is concerned, the testimony of the

bank examiner sufficiently shows his character. The dissatisfaction of the Banking Department with Ellis and the final request that he be removed came from these things: that in a great many cases he was ignorant of the facts concerning a loan; that he was an optimist; that he was indisposed to contract, but rather inclined to go out and get business with the inducement of making a loan; that his manner of keeping accounts was slovenly; that he over-estimated the resources of the Bank, and was prone to extend credit rather than contract; that he was an optimist and judged the worth of his loans by capitalizing prices when they were at their peak and expecting liquidation of his paper on these prices, and that "a man of far sterner stuff" than he should be in charge of the Bank during the liquidation period (Tr., 62, 65). It is clear that a man of Ellis' type could not see failure as certain and imminent until the examiner told him the Bank must be closed.

With respect to the Buckholtz letters, if they were to be judged by the fragments which counsel have quoted from them it might be imagined that he at least knew the Bank's condition was hopeless. But the letters must not be so judged. They must be read as a whole if they are to serve as a test of his frame of mind. So read, it will be seen that never, until the very last, did he believe the situation to be hopeless. Those letters show the cause of the Central Bank's troubles. They show there was a steady withdrawal of deposits in progress due to the general deflation and

the inability of the bank's customers, horticulturists, agriculturists, and those dependent upon those industries, to realize from their crops and produce. From the same causes, collections were very difficult, and it was a case of turning and twisting to raise the necessary cash to meet the daily withdrawals and keep up the required reserve. But through all these letters there runs a vein of optimism, and again and again the expectation is expressed that the Bank in a very short time will be able to take an upward turn and begin the payment of its indebtedness. The resources looked forward to for the bettering of conditions were, first, the improvement of market conditions which would permit of the disposal of crops and produce, stop deposit withdrawals, and make collections easier. The bankers and business men of Yakima were agreed that this condition must come very soon, certainly during February and March. The second avenue of relief was the $50,000 deposit of county funds which was expected about the 1st of February. The third was a proposed sale of the Bank, under the terms of which, in some manner not appearing in the letters, additional funds were to come into the Bank. The fourth and final resource was the continued rediscounting of paper by the Trust Company. We have remarked in our opening brief that Buckholtz' letters to the officers of the Trust Company were of the frankest, and that they stated the unfavorable conditions prevailing and to be dealt with in their worst aspect. At the same time, however, these letters leave no doubt that Buckholtz not only saw avenues of relief for the Central Bank,

but to the last believed that it would survive. In a letter written to Mr. Rutter on the 23d, two days after the collection was made and on the same date as the letter to Mr. Rutter in which he told of the outstanding $51,000 draft and expressed the opinion that the Central Bank would fail if the draft were not paid, he enclosed a list of loans which he thought could be collected in full during the next 90 days, aggregating $150,000, and told of partial payments from which an additional $50,000 could be realized, saying that while Ellis' estimate of the amount which would be realized in that way ran very much higher than his, as he had in some instances discounted Ellis' notions by 50%, he believed his own ideas to be conservative and that collections to that amount could be looked for within the time stated (Tr., 222-223). It is true that on the same day he wrote a longer letter and one of more discouraging tone to Mr. Rutter. But in that letter also he speaks of many resources which will relieve the Central Bank from its difficulties and carry it over. So far from indicating knowledge that the situation of the bank was hopeless, or even that it was in a desperate situation, he says in this letter that business men and bankers are confident of a good movement of crops and produce during February and March and running into April, and that while he has not totaled up the exact figures on the loans based on each commodity and the probable liquidation thereof, yet that "if deposits keep up to where they are, or nearly so, enabling us to keep up a reserve, I feel justified in making the statement that I am still confident of cutting down our borrowed

money to a nominal amount, if not entirely, during the next 90 days" (Tr., 229). Reading those letters as a whole, therefore, and not accepting the misconception which would be created by accepting the fragments from them which are quoted in the plaintiff's brief, it is apparent that Buckholtz never, until the last, thought the condition of the Bank desperate.

Space will not permit that we go through plaintiff's brief and correct the many inaccuracies of statement concerning the situation under discussion which are found therein. We must content ourselves in the main by again begging the Court to read this correspondence in its entirety, for if this is done these inaccuracies will be exposed. There are one or two, however, that are so flagrant that we must remark upon them. Thus, on page 58 of the brief, it is said that on the 21st, the day that the collection involved was made, the Trust Company and its representatives were aware that the last ray of hope for the Central Bank had gone glimmering and that further effort was futile, saying that this is confirmed by the fact that "all effort to provide further funds was then and there discontinued." Counsel are ill advised in making such a statement. On the 21st, 23d and 24th, Buckholtz wrote to Mr. Rutter and Mr. Triplett suggesting various plans for providing additional funds if they should be needed and requesting to be advised if these would be forthcoming (Tr., 219-237). In one of these letters Buckholtz spoke of applying to "Herb" (Herbert Witherspoon, an officer of the National City Bank of

Seattle) for permission to withdraw $30,000 in Liberty Bonds which the Central Bank had pledged with the National City Bank, and ask him to accept real estate notes and mortgages, good but slow, in lieu thereof. Replying to this letter on the 24th, Mr. Triplett said that "Herb" ought to be willing to help out the Central Bank in that way, but that if he was not the Trust Company would advance $30,000 to take up the note with the National City Bank, thus enabling the Central Bank to sell the Liberty bonds then pledged with the National City Bank. To secure this additional loan, the Trust Company offered to take the note of the Central Bank secured by collateral of good but slow paper. This proposition never came to anything as the situation became acute before it could be acted on. The letters show, however, how inaccurate is counsel's statement above referred to.

In the same connection it is said that from the 21st on there were no new rediscounts and no further effort to provide funds for the Central Bank. Yet it appears that on the 21st the Central Bank remitted to the Trust Company for rediscount $5,775 in notes; on the 22nd, $500; on the 24th, $6,400; and on the 26th, $4,900 (Tr. 139). True, the balance did not change in that time because the proceeds of such remittances, together with the cash remittances made, were used in paying drafts drawn by the Central Bank upon the Trust Company. The fact remains, nevertheless, that there was not an abandonment of all efforts to provide further funds for the Central Bank.

The most complete rejoinder to the assertion that on the 21st it was known to all concerned, including therein the Trust Company, that the last ray of hope had gone glimmering and that it was useless to attempt to save the Central Bank, is found in the fact that the Trust Company continued to pay all drafts drawn upon it by the Central Bank down to the 26th, when the $51,000 draft was presented. If on the 22nd, when the Trust Company received the $48,000 cash remittance from the Central Bank, it had known or believed that the condition of the Central Bank was hopeless and that it was futile to endeavor to provide further funds for it, would it not then have refused to pay further drafts and applied the cash it had in hand to the indebtedness of the Central Bank to it? It did not do so, but on the contrary continued to pay drafts drawn upon it by the Central Bank as they were presented until it had paid out thousands of dollars and would have had to permit a $27,000 overdraft in order to pay the $51,000 draft sent to Seattle. That circumstance speaks for itself and shows the inaccuracy of the statement that it was known days before the culmination of the troubles of the Central Bank that its situation was hopeless.

To return to the law of the matter. By reference to the authorities cited in our opening brief it will be observed that while the officers of a bank have "hope" (174 U. S., 618), "honest hope" (95 Fed., 732), "reasonable hopes" (201 Fed., 54), of surviving the "financial storm" or the known insolvency with which the

bank is contending, fraud cannot be imputed because they continue to conduct business in the usual manner and enter into the usual engagements of banks. Since our opening brief was written there has appeared in the reports a decision in a case in which were involved all the facts, and more, which appear in the case at bar, and which are said by plaintiff's counsel to fix fraud upon the Central Bank in undertaking the collection of plaintiff's check. That decision is *Steele v. Allen* (Mass.), 134 N. E., 401. Beginning in July, 1916, and running through to September, 1919, the bank whose affairs were there dealt with failed to maintain the required legal reserve for the greater part of the time. In October and November, 1919, conditions bettered, deposits increased, and the required reserve was exceeded. Then a steady decline in deposits began, interrupted occasionally by temporary increases, and from thence on the legal reserve was "almost never equalled." In April, 1920, it was discovered that through the misconduct of the treasurer excessive loans had been made to and large overdrafts suffered by a single depositor. The treasurer resigned, and to tide over the situation a number of the directors gave their notes, aggregating $125,000, to the bank. Because of the steady shrinkage of deposits, and the large amount of slow and doubtful loans with which the commercial department was burdened, there were constant transfers of cash from the savings department to the commercial department, without which the latter could not possibly have had enough cash for its necessities. The bank's doors were closed in September, 1920. Sundry

depositors sought to hold the bank commissioner as trustee because of the receipt of their deposits after the bank was insolvent, to the knowledge of its officers. It was found that the president, the treasurer, and the assistant treasurer, knew the bank was insolvent, but it was also found that

> "In accepting all the deposits the president and assistant treasurer 'acted under a hope' that the trust company 'would in some way or other pull through its difficulties and did not anticipate its closing. Though both these men knew the facts, * * * they never analyzed the situation.' There was no evidence showing on the part of either of these officers any personal fraudulent intent to bring about any gain or advantage for themselves by continuing to run the trust company and accept deposits, although, knowing the facts as to its condition, they knew it was insolvent."

It was held that upon such findings there could be no recovery. Stating the broad general rule that a bank which accepts deposits when it is "hopelessly insolvent" is guilty of a fraud which entitles the depositor to rescind the contract of deposit and hold the bank as trustee, the court said further:

> "On the other hand, simple insolvency, even of a bank, does not warrant the rescission of deposits if there are genuine and reasonable hope, expectation and intention on the part of the officers of the bank to carry on its business and to recover sound financial standing. To warrant such rescission there must be the further fact that it is reasonably apparent to its officers that the concern will presently be unable to meet its obligations as they are likely to mature and will be obliged to suspend its ordinary operation. The facts must

> establish the conclusion that the trust company accepted the deposit knowing through its officers that it would not and could not pay the money when demanded by the depositor."

There is the settled rule, and much temerity would be needed to say that the present case measures up to its requirements.

II.

Trust Fund Not Identified in the Hands of the Trust Company.

There is nothing new in plaintiff's brief respecting the identification of the trust fund—if one existed—in the hands of the Trust Company, save the assertion that the rule that there must be an augmentation of funds is only applicable where a preference over general creditors is sought by impressing a trust upon funds in a receiver's hands. Brief, pp. 3, 71.

That is a misapprehension of the theory upon which a recovery of a trust fund from third parties is permitted. To recover a trust fund it must be shown that the plaintiff's property, or its proceeds, has come into the defendant's hands, and that it is either retained by the defendant, or that defendant has received the benefit of it. There must, in other words, be an augmentation of the defendant's funds by reason of the receipt of the plaintiff's property. Manifestly this augmentation must be shown whether the third party is the receiver of a bank, who represents general creditors, or, as here, an independent third party who is

claimed to have received the trust fund prior to the insolvency of the bank. The principle is too plain to require more than statement.

III.

Conceding the Existence of a Trust Fund Coming Into the Hands of the Trust Company, there was Error in the Amount of the Recovery Awarded.

Under the preceding head we remarked the rule that it was essential to the recovery of a trust fund that it be traced into and identified in the hands of the person from whom recovery is sought. The rule is illustrated by two decisions of this Court: *Titlow vs. McCormick,* 236 Fed., 209, and *United States National Bank v. Centralia,* 240 Fed., 93. In those cases the trust funds had been deposited by the trustee banks with other banks and paid out on checks and drafts drawn by the trustees. It was held that the amounts so paid out could not be identified and so were not recoverable. In the present case, the account of the Central Bank with the Trust Company was overdrawn when the remittance in which was included the proceeds of the collection of plaintiff's check was received. The remittance paid that overdraft and left a balance to the credit of the Central Bank. Subsequently, but before the Trust Company was informed of the source from which the principal part of the remittance was derived, it paid a number of drafts drawn on it by the Central Bank, thus absorbing the major portion of the remittance. The District Court

refused to allow for and deduct from the recovery the amount of the existing overdraft and of the drafts subsequently paid, but awarded a recovery based upon the amount of the remittance as received.

Whatever disposition may be made of the preceding questions, that action was erroneous. It cannot be justified unless it is said that Buckholtz was an officer of the Trust Company, acting in its interest while he was with the Central Bank, and that therefore his knowledge of the source of the remittance, and of everything else which constituted it a trust fund, was as a matter of law imputed to his principal, the Trust Company, so that it knew when it received the remittance that the money did not belong to the Trust Company, could not be applied on its debts or paid out on its order, but must be held subject to the order of the owner. And such is the theory upon which it is sought to be justified.

The rule that "a bank is chargeable with knowledge acquired by its cashier, president, or other active officers pertaining to transactions within the scope of the bank's business" is well settled. 7 Corpus Juris, 530. It is otherwise stated "that knowledge acquired by or notice communicated to an officer or agent of a corporation while acting in his official capacity or within the scope of his duties will be imputed to the corporation." 3 R. C. L., 475. It is equally well settled, however, that "knowledge acquired by a bank officer in his private capacity and not while acting for and on behalf of the bank, and which was not communi-

cated to any other officer of the bank, is not imputed to it," *Id.*, 477-478, and that where a bank officer is also an officer of another corporation, knowledge acquired by him in the latter capacity will not be imputed to the bank. *Id.*, 479, 7 Corpus Juris, 534. Buckholtz' knowledge of matters which may be supposed to show the remittance to have been a trust fund therefore cannot be imputed to the Trust Company unless it is said that while he was in the Central Bank he was (1) an active officer of the Trust Company, (2) engaged in the discharge of duties pertaining to its business and (3) that he was not an officer or acting in the interest of the Central Bank, but solely for the Trust Company.

To bring the case within those requirements, plaintiff's counsel have evolved this theory: The relations between the Trust Company and the Central Bank were exceedingly close, so much so that the former could at pleasure impose its will upon the latter. A run began on the Central Bank in the first days of January which rendered its condition desperate. To secure the amount of its debt and save itself from loss, the Trust Company sent Buckholtz to Yakima to take charge of the Central Bank, keep it open as long as possible, and in the interim salve from the sinking hulk enough to pay the debt to the Trust Company. When Buckholtz went in Barghoorn went out, having nothing further to do with the Bank's affairs. Ellis remained as a figurehead, to disguise what was going on, but Buckholtz, representing the Trust Company,

was in complete control.

Greater credit could be given plaintiff's counsel for this ingenious theory if it were not so obviously adapted from *Dunlap v. Seattle Nat'l Bank*, 93 Wash., 568. There the Supreme Court of Washington denied recovery upon a very similar theory because there was nothing to sustain it but suspicion, based upon circumstances which were as consistent with honesty as dishonesty. There is no more to sustain the theory here advanced. Did space permit the putting of the isolated circumstances and fragments of correspondence upon which counsel build their theory into their appropriate place in the contexture of the entire transaction, the theory would merit and receive scant heed. As it is not permissible to deal with the matter at such length, it must be treated on broader grounds.

The "run" which—according to counsel—reduced the Central Bank to desperate straits and caused the Trust Company to put Buckholtz in charge of the Bank, occurred during the "first two or three days of January." (Tr., 94). Barghoorn and Buckholtz left Spokane on the 5th January and reached Yakima the morning of the 6th. (*Id.*) On the 5th, when, if counsel are right, the officers of the Trust Company decided that it would be necessary to put Buckholtz in charge of the Central Bank in order to save the debt the Bank owed the Trust Company, the account between the two banks stood thus: The Trust Company held the Central Bank's note for $20,000 (Tr., 90). This note was secured by a pledge of Liberty bonds

(Tr., 107). The Central Bank also had rediscounts with the Trust Company amounting to $119,000 (Tr., 85), and an overdraft of $38,000 (Tr., 87). If all the rediscounted notes were accounted worthless, so that the Trust Company would have no recourse save on the endorsement of the Central Bank, and the Liberty bonds were excluded from the calculation, the indebtedness of the Central Bank to the Trust Company was then $177,000. But it must be remembered that the testimony and the correspondence indicates that all the rediscounted notes then held by the Trust Company were, or were accounted to be, perfectly good. The difficulty in obtaining good notes for rediscount came later, toward the end of the month. The Liberty bonds, of course, made the $20,000 note of the Central Bank good. At that time, therefore, the only obligation of the Central Bank for which the Trust Company did not hold ample security, and about which it could have felt any concern, was the overdraft of $38,000. Now how went the account after this, when—say counsel—Buckholtz was in charge of the Central Bank, endeavoring to make the amount of its debt to the Trust Company out of it before it was forced to suspend? During the next few days the overdraft went up to $54,000, then disappeared to be replaced by a balance, then came back, a few thousands at a time, until it had again reached the peak at the time the Central Bank closed (Tr., 87). How, pray, is this reconcilable with counsel's theory? If Buckholtz was put in charge of the Central Bank on the 5th for the purpose of squeezing it dry before it was obliged to close, it

is evident that a $16,000 increase in the overdraft would not have been permitted. Most assuredly when the overdraft was extinguished and replaced by a credit, at one time of $21,000, during the middle of January, the Trust Company, if it had not seized the credit, would not have permitted it to be succeeded by an overdraft, mounting from day to day, until at the last it was at its peak. Then look at the rediscounts. On the 6th and 7th they amounted to $116,000; on the 8th they went to $163,000; on the 11th to $184,000; and from thence to the 24th, with some variations, to $192,000 (Tr., 85). This $73,000 increase in rediscounts, be it remembered, was notwithstanding the Trust Company was aware that many of the notes it was getting were not gilt-edged; that if good they were at least slow. The letters in which Triplett criticizes some of the notes sent for rediscount show that the Trust Company did not want the notes, and only took them to assist the Central Bank through what was regarded as a temporary cash shortage. (See Tr., 145-146, 163-164, 174, 199-200, 201-203, 207-209.) Again we ask, how is such an increase reconcilable with counsel's theory? If Buckholtz was put in charge of the Central Bank to get money out of it to pay its debt to the Trust Company, the debt would not have been permitted to increase as it did. And lastly we come to the $20,000 note secured by Liberty bonds. During the latter part of the month the Trust Company permitted the withdrawal of the bonds and took as security in their stead personal notes, slow, and many not paid at the time of trial (Tr., 107,

136-137). Does this release of unquestionable security and the acceptance of security which was slow, and might or might not be good, indicate that a looting of the Central Bank was then forward?

Summing up, then, we have this situation. On the 5th, when Buckholtz went to Yakima, the Central Bank owed the Trust Company an overdraft of $38,000, a note for $20,000 secured by Liberty bonds, and had rediscounted with it notes amounting to $119,000, which were or were supposed to be good, but on which it was endorser. The total obligation represented was $177,000, but all was well secured but the $38,000 overdraft. By the 25th, when, counsel say, the Trust Company had decided that the time had come to permit the Central Bank to be closed, the note remained in the same amount but was secured by personal notes instead of Liberty bonds, and the rediscounts had risen to $192,000, some of which were not rated highly. The overdraft, according to the books of the Central Bank, which contained entries of the $48,000 and the $51,000 draft, was $56,000 (Tr., 87). According to the books of the Trust Company, which showed the $48,000 credit but not the $51,000 debit, the Central Bank had a balance of $24,000 (Tr., 136). Excluding the $48,000 credit, so as to omit the Seattle National Bank transaction entirely, an overdraft of $24,000 would have appeared. Against the total $177,000 obligation when Buckholtz went to Yakima appears: (1) If the books of the Central Bank are taken, an obligation of $268,000; (2) If the books of the

Trust Company are taken, an obligation of $188,000; (3) If both credit and debt for the Seattle National Bank are omitted, an obligation of $236,000. However the figures are cast, the debt is much greater and the security much poorer than when Buckholtz went to Yakima. And in the face of this counsel say he was sent there to take charge of the Central Bank and milk it for the Trust Company's benefit!

Furthermore, counsel's theory must be judged by what was done not only, but also by what the Trust Company offered to do. The National City Bank of Seattle—the presiding genius of which is referred to in the letters as "Herb"—held the note of the Central Bank for $30,000, secured by Liberty bonds of an equal amount. Buckholtz wrote Triplett on the 21st that one of his plans for keeping up the cash reserve, if it became necessary, was to get Herb to take real estate contracts and mortgages as security in the place of the Liberty bonds, thus releasing the latter for sale (Tr., 221). Triplett replied on the 24th, approving of the idea and suggesting that it be broached to Herb, who, he thought, 'ought to be willing to do that much for you." In the event that he declined, however, Triplett recommended that the bonds be sold to Herb, giving the Central Bank $30,000 in cash, and the Trust Company would take over the $30,000 obligation if secured by "good but slow" paper; *i. e.*, "paper which although it will ultimately be paid cannot be liquidated from so-called quick assets." (Tr., 225-226). The rapid march of events after this offer was made prevented

any actoin being taken on it, but its good faith is beyond question, and it dispels any notion that the Trust Company, through its representative, Buckholtz, was then engaged in squeezing every penny it could from the Central Bank before its inevitable failure occurred.

Again, when the bank examiner was endeavoring on the 26th and 27th to procure financial assistance from the Yakima bankers, so that the Central Bank would not need be closed, he called up some outside banks, among others the Trust Company, to see if they would aid. The Trust Company agreed to advance $15,000, and on a second call, when it was said a larger sum would be necessary, it raised the amount to $20,000 (Tr., 58). This came to nothing because the Yakima banks "kind of petered out' (*Id.*), but the agreement of the Trust Company to advance $20,000 to a fund sufficient to put the Central Bank on its feet forbids that counsel's theory be accepted.

Along with the foregoing suggestions goes this thought. The Trust Company received the $48,000 remittance from the Central Bank on Saturday, the 22nd. It extinguished an overdraft and gave the Central Bank a credit of some $38,000 (Tr., 111). (According to the books of the Central Bank, after deducting a $16,000 overdraft, the credit would have been around $32,000). (Tr., 42). On the 22d the Central Bank sent a cash remittance of $2,500 to the Trust Company; on the 24th, of $4,000; and on the 25th, of $7,000 (Tr., 139-140). On the 22d it sent for rediscount notes amounting to $500; on the 24th, of $6,500,

and on the 26th, of $5,000 (Tr., 139). Adding these remittances for credit to the credit remaining after extinguishment of the overdraft by the $48,500 remittance, the Trust Company would have had $63,500 to apply to the debt of the Central Bank had it refused payment of the drafts drawn upon it by the Central Bank and presented between the 22d and the 25th. That it did not refuse such payment, but paid all drafts presented until there remained, on the morning of the 25th, a credit to the Central Bank of but $24,682, certainly shows that it had no thought of taking advantage of the Central Bank or its creditors.

An essential part of counsel's theory is that Buckholtz was placed in complete control of the Central Bank, Barghoorn dropping out entirely and Ellis remaining as a mere figurehead. That is proven untrue by the testimony of Barghoorn and Ellis, without reference to Buckholtz' testimony, which is also flatly contradictory of it. Barghoorn testified that after Buckholtz became connected with the Central Bank Ellis was running it and that Buckholtz had no official position; that the duties assigned to Buckholtz were to look after the rediscounts with the Trust Company, the financial statements, and the making of collections on the notes; that Ellis was too easy in enforcing payments and Buckholtz was put in charge of collections with directions to enforce payments as fast as he could without doing harm, and that Ellis was supreme in his province and Buckholtz in his (Tr., 50-51). Ellis testified that Buckholtz was handling

the rediscounts for the Trust Company; that he (Buckholtz) and Ellis would go through the notes daily, selecting and classifying them and getting out history sheets; that Buckholtz didn't have charge of the whole of the credit department, but that he (Ellis) and Buckholtz had charge of it jointly, and that he and Buckholtz consulted daily concerning the important transactions of the bank (Tr., 95, 97). This testimony, which, of course, cannot be questioned, merely confirms Buckholtz' testimony that all that he had to do with the business of the Central Bank was to inform himself concerning the paper, select paper for rediscounting with the Trust Company, and enforce collections (Tr., 128). It is confirmed also by Buckholtz' letters written at the time.

Another essential part of counsel's theory is that the sending of Buckholtz to Yakima was a hurried decision, forced by the crisis caused by the run on the Central Bank, and not thought of until the 25th, the day Buckholtz left. It is true that the decision that *Buckholtz* should go to Yakima was not reached until the 25th, but the further implication which counsel would make, *viz.*; that there had been no thought of sending anyone from Spokane to go into the Central Bank until that date, is utterly untrue. The State bank examiner testified that in December he talked with Barghoorn about getting someone to take Ellis' place, and that Barghoorn had agreed that he would do so as soon as he could get a suitable man to take the place, saying that he had been talking to various

bankers about "trying to get a man that would measure up to the required standard" (Tr., 63). Mr. Rutter testified that in the latter part of 1920 Barghoorn said it was necessary to get a man to succeed Ellis, and that he negotiated with one Richards, an employe of the Trust Company, who went to Yakima and, after looking over the situation, decided not to take the place, and that thereafter Barghoorn consulted with him (Rutter) from time to time about various prospects until finally Buckholtz was selected (Tr., 121). This testimony is confirmed by Triplett, who testified that Barghoorn talked with him several times about a man to take Ellis' place and that he (Triplett) sent several men to Barghoorn who did not suit him, until finally Buckholtz was sent (Tr., 101). And Barghoorn testified that when he employed Buckholtz to go to Yakima it was understood that if Buckholtz proved efficient he would take Ellis' place as soon as the change could be made "without making trouble" (Tr. 50).

Counsel make much of the fact that the reason for Buckholtz being in Yakima was not made public, and that in one of his letters Buckholtz said no one knew why he was there, but supposed that he was merely taking "Van's" place, "Van" being a former employe of the Central Bank. Barghoorn's testimony shows why it was intended that the reason for Buckholtz being in the bank should not be known. The Central Bank, like all other small banks with insufficient liquid assets, was going through a critical period, for the deflation period was a trying time for all banks. Be-

cause of the insistence of the State Banking Department, he was endeavoring to select a man to take Ellis' place. While the officers of the Trust Company, who had long known Buckholtz, had no doubt that he would prove a suitable man for the place, Barghoorn, who had no personal acquaintance with Buckholtz, or at least no intimate knowledge of his qualifications, was not so sanguine. He therefore employed Buckholtz to take Ellis' place only on the condition that he should have it "if he proved efficient" (Tr., 50). While determining whether Buckholtz was qualified to take the place, Barghoorn, of course, did not desire to lose Ellis or to have Ellis' efficiency impaired by the knowledge that Barghoorn intended to get someone to take his place and was trying out Buckholtz with that end in view. Barghoorn told Buckholtz, therefore, that there was no definite time when he could expect to take Ellis' place; that the change would come "sooner or later * * * as soon as it could be done without making trouble" (Tr., 50). Yakima is a small town, and naturally Buckholtz would have to be very guarded as to the understanding under which he was employed to keep it from Ellis' ears.

Stress is laid upon one of Buckholtz' letters in which he gives a list of collateral "to assist Mr. Blake in checking up collateral" which he said was in his possession "as agent for the Spokane & Eastern Trust Company." The fact that Buckholtz was personally intrusted with sundry collateral and rediscounted notes of the Trust Company was one concerning which no

bones were made, either at the time or afterward, Triplett and Buckholtz both testifying that for the accommodation of both the Central Bank and the Trust Company, and for facilitating the financial transactions between them, it was agreed that the Trust Company would send to Buckholtz personally—not to Ellis nor to the Central Bank—the collateral and rediscounted paper as its due date approached, so that collections could be made or renewals had if that were necessary (Tr., 102-103, 127). This arrangement was known to Barghoorn, and was one to which he had no objection (Tr., 49).

One Hay, at one time a State bank examiner, testified concerning a remark made by Mr. Rutter at a meeting of the State Guaranty Board in the Governor's office at Olympia during January. The remark, if it were as unqualified as counsel put it in their brief, might have some evidentiary weight. According to that, Mr. Rutter said: 'We have a man over there who is looking after things and things are coming along very nicely." The witness, however, qualified that by adding the words "or something to that effect" (Tr., 70). Fairness would seem to require that these qualifying words should have been added to the quotation from the witness' testimony. This testimony was given a year after the alleged conversation occurred, and of course no witness who would be entitled to any credit would attempt to state positively what was said in a casual conversation, particularly when the witness had no interest in what was said, as this witness evi-

dently had not in what Mr. Rutter said. Mr. Rutter testified that he remembered the occasion referred to, that the Governor said something about a draft having been turned down, and Mr. Rutter said he didn't think that possible, that Mr. Buckholtz was working there, and that he explained to the Governor who Buckholtz was, that he was a good man, etc., but that whatever form of expression he may have used he did not intend to convey the idea that Buckholtz was over there as a representative of the Trust Company for he had no such thought in his mind (Tr., 123).

During the oral argument, plaintiff's counsel, pressing his theory that the Trust Company was in complete charge of the situation and determined how long the Central Bank should remain open and when it should close, conveyed the impression, in language which is not precisely recalled by the writer, that on the 25th an officer of the Trust Company telephoned from Spokane to Mr. Ross, the vice president of the Central Bank, at Yakima, that the Bank should be closed. That some such impression was conveyed to the Court was suggetsed to the mind of the writer by the fact that His Honor, Judge Hunt, immediately inquired who this officer was, to which counsel replied that it was Mr. Rutter, the president of the Trust Company. Now all there was to the circumstance referred to was this: On the morning of the 25th, Mr. Rutter and Mr. Triplett received letters from Buckholtz telling of the outstanding $51,000 draft, and that a heavy overdraft would be necessary if it were

paid, which, if allowed, would far exceed the limit of the credit at any time theretofore extended to the Central Bank. Thereafter, at some time during the day, the Executive Committee was called together, counsel for the Trust Company was called in, and it was decided not to allow the overdraft which would be necessary to pay the draft. As soon as the officers of the Trust Company could get in touch with Mr. Barghoorn, which was not until late in the afternoon, that decision was conveyed to him (Tr., 109, 122). Mr. Ross testified that he received a telephone message from Mr. Rutter just before dinner; that in this message Mr. Rutter said that Barghoorn was with him and had asked him to call up Mr. Ross, request him to get hold of Buckholtz, and get some of the Yakima bankers together to discuss matters relative to the Central Bank; that all that Mr. Rutter said was that he understood rumors about the Central Bank were in circulation and that the Yakima banks ought to get together to help the institution out; that Buckholtz had the run of things and could explain the situation to the Yakima bankers; that Mr. Barghoorn would be down the next morning (the 26th) and discuss the matter with the Yakima bankers, and that something would have to be done by the Yakima banks to keep the Central Bank from having some trouble. There was nothing more definite than this in the telephone message, and in compliance with it the witness arranged for certain Yakima bankers to discuss the matter that night and later on the next morning with Braghoorn (Tr., 67-69). It certainly requires

an unrestrained imagination to make out of this effort of Mr. Rutter's, undertaken at Mr. Barghoorn's request, to do something to avert trouble for and the closing of the Central Bank, a direction that the Central Bank must be closed.

It is claimed, however, that assuming that Buckholtz was not an officer or agent of the Trust Company whose knowledge would be imputed to it as matter of law, that as matter of fact Buckholtz communicated by telephone to the officers of the Trust Company on the 21st the origin of the $48,000 remittance and the fact of the outstanding $51,000 draft, whereby, disregarding any fiction of law, they were actually informed of the fact that the remittance was a trust fund. This claim is based entirely on the testimony of one Miner, an officer of the Seattle National Bank who went to Yakima on the 27th January in plaintiff's interest and there saw and talked with Buckholtz. This witness was extremely partisan, as will be observed by the mere reading of his testimony. It is perhaps natural that he should be so, since plaintiff is obviously a valued customer of the Seattle National Bank, and that bank must have felt in some degree morally responsible for the loss caused plaintiff by the bank's bad judgment in the selection of a collecting agent. Miner, on his direct examination, strongly gave the impression that Buckholtz had told him that on the 21st he (Buckholtz) called up the officers of the Trust Company and told them the facts concerning the draft. On cross examination, however, he ad-

mitted that Buckholtz did not tell him when he (Buckholtz) told the officers of the Trust Company about the draft, and that it was simply the witness' inference that the conversation occurred on the 21st. He finally admitted that all that Buckholtz said was that he had talked with Mr. Triplett about the draft by long distance, and that no information was given to the witness as to what he said, as to what Triplett said, or as to how much, if any, information was given concerning the draft (Tr., 75-76). Buckholtz denies that he told Miner anything of the sort and says that he did not telephone the Trust Company anything about the draft, and that the only information he gave concerning it was contained in the letters which he wrote to Mr. Rutter and Mr. Triplett on the 23d and the 24th respectively, these being received by them on the morning of the 25th (Tr., 131). This testimony is confirmed by the manner in which he spoke of the draft in this letter. He said to Mr. Rutter in the letter:

> "Yesterday, we mailed a $51,000.00 draft on you to the Seattle National Bank covering a large letter of items on other local banks, the net of which has been remitted to you and no doubt we will have a few dollars there to meet it. The draft will likely reach you Tuesday or Wednesday and if you pay it the overdraft created will be the limit to date of credit advanced this institution. Have Mr. Triplett ascertain the amount of the overdraft created if this draft is paid. If you do not pay it we are gone." (Tr., 231-232).

It is obvious that if Buckholtz had theretofore informed the officers of the Trust Company by telephone of the facts concerning this draft, he would not have spoken

of it and described it in such detail in his letter. It exceeds likelihood that he would have thought it necessary to again mention it at all, but if he had his expression certainly would have been something like this: "The draft about which I telephoned you will probably reach you Tuesday or Wednesday, and if you do not pay it, the bank will have to close." Triplett testified that the letters gave him the first information he received concerning the draft (Tr., 108-109, 119).

In disposing of the question now presented, the Court is required to choose between two theories. The first is that propounded by plaintiff, sinister in aspect and requiring the finding of fraud and perjury committed by gentlemen who stand high in the community and are of unimpeachable character. That theory requires that it be held that because of some peculiarly intimate relation between the Central Bank and the Trust Company, the Trust Company undertook to carry the insolvent Central Bank, whereby a heavy indebtedness to the Trust Company was incurred. It requires that it be held that a crisis was created by a run upon the Bank early in January, and that to deal with the situation the Trust Company virtually took over the Central Bank, placed Buckholtz in charge of it, and that its purpose in doing so was to extract as much money as it could from the Central Bank before its inevitable failure occurred, and that it chose the moment for the closing of the Central Bank, and chose it because at that precise moment it could permit the Central Bank to be closed with the greatest profit to itself.

On the other hand is the theory which we propound. It is supported by the testimony of the state bank examiner, by the positive testimony of Mr. Barghoorn, of the officers of the Trust Company, and of Buckholtz. It is supported clearly and unmistakably by the correspondence between Buckholtz and officers of the Trust Company if that correspondence is read as a whole and isolated scraps of it are not relied upon. That theory is that the Central Bank, although a small bank and with insufficient liquid assets, was nevertheless a solvent institution and would have continued so had it not been for the beginning of the deflation period in 1920. That critical period caused it embarrassment, as it did every other bank, especially those whose assets were not of the liquid sort. Considering the extent of the deflation which occurred and the period for which it continued, it is evident that the Central Bank could not have survived as long as it did if it had not had outside assistance. In that it was not singular. Many other banks were in the same condition, and many other banks besides it failed although they received outside assistance. Nor was there anything singular in the aid which was extended to the Central Bank by the Trust Company. It was such aid as the Trust Company was extending to many other small banks which were its correspondents, and with whom it could not be said there was any closer relationship than that of correspondents. In that theory, Buckholtz' connection with the Central Bank is a mere incident. He was there primarily because the State Banking Department had requested a change

in managers, and secondarily to aid in the enforcement of collections and the selection of rediscounts which would be satisfactory to the Trust Company. He was neither agent nor employe of the Trust Company in any other sense, than that for the accommodation of the Central Bank as well as the Trust Company, and for the facilitation of the extension of financial assistance, he was entrusted by the Trust Company with collateral and rediscouned notes as they approached maturity so that they could be the better collected or renewed, as the case might be. The closing of the Central Bank was not dictated by the Trust Company, neither did it result from any improper or unfriendly motive on the Trust Company's part. It was caused by the fact that the deflation period was more acute and continued longer than was expected, that the officers of the Central Bank did not take sufficient account of its situation, and that its assets were not of the liquid character which was required if it was to be carried through the critical period. To the last the attitude of the Trust Company to the Central Bank was of the utmost liberality. On the 24th, but three days before the Central Bank was obliged to close its doors, the Trust Company offered to advance an additional $30,000 if the Central Bank could give it security. The feeling toward the Bank is expressed in unmistakable terms in that letter. It is that the Trust Company was "willing and ready to stand back of the institution (Central Bank) to a reasonable extent," and that its feeling was "the most friendly in the world and we are willing to do every-

thing we can as long as the stuff is reasonably good," and required nothing more than that it should be furnished with notes for rediscount which, albeit slow, could be accounted good. Its attitude is further shown by its agreement on the day before the Central Bank closed, at the request of the bank examiner, to advance $20,000 without security if other banks would contribute with it to a fund sufficient to put the Central Bank on its feet. The theory is, in short, that the good faith of the Trust Company in its dealings with the Central Bank is beyond reproach, and that it went as far as any bank could be reasonably expected to go and farther than most banks would have gone in its endeavor to pull the Central Bank through.

There ought not to be much doubt which of these two opposed theories will be adopted. In support of the theory which we propound are positive testimony and evidentiary circumstances of the most compelling character. In support of the theory which plaintiff's counsel propound are nothing but circumstances and expressions of which the utmost that can be said is that they are equivocal, and if considered from the viewpoint of suspicion, engender an impression that there might have been bad faith and fraud in the transactions between the two banks. Your Honors are not warranted in accepting plaintiff's theory upon such evidence. Plaintiff is required to prove fraud to sustain its case, and to prove fraud the evidence must be clear, unequivocal and convincing. It cannot be inferred from "facts and circumstances lawful in themselves and

consistent with an honest purpose." The settled rule is that "slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results, are not sufficient to establish fraud." *Dunlap v. Seattle Nat'l Bank,* 93 Wash., 568, *Foster v. McAlester,* 114 Fed., 145. We submit that no finding of fraud in this case is justified, and that the Court is required to accept the unimpeached testimony of Messrs. Barghoorn, Rutter, Triplett and Buckholtz regarding the relations between the Central Bank and the Trust Company and the position of Buckholtz with respect to them, especially in view of the confirmance of the correspondence. That being so, whatever may be held with respect to the existence of a trust fund, or its identification in the hands of the Trust Company, nevertheless the Trust Company cannot be held for anything more than the amount of the remittance which remained in its hands on the morning of the 25th of January when its officers were advised by Buckholtz' letters of the origin of the remittance.

Respectfully submitted,

F. H. GRAVES
W. G. GRAVES
B. H. KIZER,

Solicitors for Appellant.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SPOKANE & EASTERN TRUST COMPANY,

Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY,

Appellee.

No. 3983

Appellant's Petition for Rehearing

F. H. GRAVES
W. G. GRAVES
B. H. KIZER,
Spokane, Washington
Solicitors for Petitioner.

EMPIRE-PACIFIC PRINTING CO., SPOKANE

FILED

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Solicitors for Petitioner.

Petition for Rehearing and Grounds Therefor.

The Trust Company prays a rehearing upon a single point; one which was not passed on in the opinion handed down. The grounds for the petition are these:

The $48,000 remittance which was made up in large part of the proceeds of plaintiff's check, was received by the Trust Company on the 22nd. In accordance with custom and the terms of the remittance, the money was credited to the general account of the Central Bank, where it was subject to drafts drawn by the Bank. On the 25th the Trust Company received a letter from Buckholtz which told of the source of the remittance. In the interim, however, it had paid to third persons a considerable part of the money received by it; such payments being made on drafts drawn by the Central Bank in the regular course of business, and presented for payment to the Trust Company in like course. As an alternative point, one to be considered in the event that the principal points were ruled against it, the Trust Company insisted, both below and on appeal, that it was entitled to credit for the payments so made, and to a deduction of their amount from the judgment given against it. So far as the opinions handed down disclose, that point was not considered. The Trust Company prays a rehearing in order that it may be considered and passed on.

Argument in Support of Petition.

The judgment in plaintiff's favor proceeds on the theory that trust property belonging to it came into the hands of the Trust Company. It is unquestionable that a *cestui que trust* may follow trust property belonging to him into the hands of a volunteer or of a purchaser with notice. It is equally unquestionable that a purchaser for a valuable consideration without notice "is entitled to full protection." 2 Perry, Trusts (5th ed.), §828. A typical case illustrating the latter rule is *Holly v. Domestic etc. Soc.,* 92 Fed., 745 (aff'd 180 U. S. 284). There an attorney had been entrusted with money for the purchase of certain realty. Instead of making the purchase he deposited the money in his private account, then paid with it, by means of his private check, a legacy which was due from him as executor of an estate. It not appearing that there was sufficient to charge the legatee with notice that its legacy was paid with trust funds, it was held that the *cestui que trust* could not recover the money from the legatee, the Court saying:

> "Neither in equity nor at law in an action for money had and received can he whose trust moneys have been perverted prevail against the title of one who has acquired them bona fide and for value. He who receives money or acquires negotiable paper in payment of a debt is a holder for value, and if he receives the money innocently, or acquires the commercial paper before its maturity, and without notice of any infirmity, has a perfect title which can-

not be subordinated to the equities of any third person."

With respect to the drafts paid by the Trust Company, it is obvious that it is in the position of a purchaser for a valuable consideration. The $48,000 remittance was treated as money belonging to the Central Bank, and from it were paid orders (drafts) drawn thereon by the Bank. If plaintiff is permitted to retake the trust fund without reimbursing the Trust Company for the payments it had made therefrom, the latter must lose the amount of such payments. It follows that the only theory which will justify a refusal to permit the deduction of those payments from the recovery against the Trust Company, is that it had notice that the fund from which it made the payments was a trust fund which belonged to plaintiff, upon which the Central Bank had no authority to draw generally.

The record does not permit the adoption of that theory. It is not pretended that the Trust Company was or could have been advised in any other way of the source of the remittance than through Buckholtz, as no other officer or employe of the Central Bank communicated with the Trust Company during the latter half of January. Buckholtz testified that the only officers of the Trust Company with whom he communicated concering anything relating to the affairs of the Central Bank were Messrs. Rutter and Triplett (Trans., 128-129), and that the sole information he gave them concerning the $48,000 remittance or its source was by letter; that

he did not telephone concerning it (Trans., 131). Mr. Rutter and Mr. Triplett both testified that the first information they received concerning the remittance and its source was contained in Buckholtz's letters of the 23d-24th (Trans., 227-237), both of which reached them on the 25th (Trans., 122, 108-109). There is absolutely nothing to cast doubt upon this testimony. True, Miner, an officer of the Seattle National Bank, testified that he had a conversation with Buckholtz on the 27th, in the course of which the latter said that he had told the officers of the Trust Company about the remittance and draft by long distance telephone. The witness explicitly admitted, however, that nothing was said tending to show the character or extent of the information given, nor the date when it was imparted. To quote:

> "He didn't tell me that he immediately called up the Spokane & Eastern by long distance; he told me he called them up on the date the cash letter was there. He didn't tell me that on the same day that the cash letter was there he called up the Spokane & Eastern and told them about it. There was no specific telephone call mentioned when he made reference to this cash letter. He simply said they were informed by means of long distance telephone call about the draft, but the date wasn't specified. I inferred from the conversation that it was on the date the cash letter came over. As to the draft that was drawn against the Spokane & Eastern, I inferred that he called them up to tell them on the date the draft was issued, but I am not saying for a moment that he specifically admitted he called them up about the draft. I don't

think the point was definitely fixed that he called them on the same date the draft was issued. I never did find out when he called them up to tell them about the draft, only that he had informed them by long distance about it. We didn't discuss correspondence at all. I didn't ask him about letters, but I did ask him about long distance. I said he informed them about this transaction; they might have called him up. He said he talked with Mr. Triplett about this draft by long distance. I didn't ask him what Mr. Triplett said. I had no curiosity on the subject of what Mr. Triplett said or how he took it; I merely wanted to know whether he had informed them. The scope of my employment was to get the information I thought was of value and he never told me what they said." (Trans., 75-76.)

It is worthy of remark that Miner testified that Mr. Nossaman, a Seattle lawyer who accompanied him, overheard some of this alleged conversation (Trans., 76). Mr. Nossaman, being called as a witness, did not corroborate Miner's testimony in any particular. He testified to no more than that he said to Buckholtz on the 27th "that it seemed to him that the Spokane & Eastern would not have appropriated the money if it knew of the outstanding draft of $51,000, and Buckholtz said they did know of it; he didn't tell witness how they had the information." (Trans., 99).

These conversations occurred two days after the Trust Company had been informed by Buckholtz' letter of the source of the remittance and of the draft, and in the light of that information had decided to refuse and had refused to pay the $51,000

draft. Mr. Nossaman's testimony, of course, casts no doubt on the testimony of Messrs. Rutter, Triplett and Buckholtz. Miner's testimony conflicts with theirs only in that he says Buckholtz told him that he (Buckholtz) talked about the draft over the telephone. Buckholtz denies that he told Miner anything of the sort (Trans., 131), and Miner's companion, Nossaman, does not corroborate him. But give full credence to Miner, and his testimony amounts to no more than this: that Buckholtz, at some time not fixed, told some officer of the Trust Company over the telephone something, neither substance nor effect stated, about the remittance and draft. It is apparent, therefore, that when, in discussing another branch of the case, the Court said in the opinion handed down that there was "credible evidence that the vice-president of the Spokane bank knew on the 21st by a telephone message of the cash remittance letter," it misapprehended the record. Miner, the only witness whose testimony tends to show that there was a telephone message relating to the subject, expressly says that nothing was said which tended to show when the telephone message of which he spoke was sent, nor what its contents were.

Moreover, uncontroverted facts show that Buckholtz did not telephone concerning the draft; at least prior to the time of informing the Trust Company by letter. In his letter of the 23d to Mr. Rutter he said:

> "Yesterday we mailed a $51,000 draft on you to the Seattle National Bank covering a large letter of items on other local banks, the net of which has been remitted to you and no doubt we will have a few dollars there to meet it. The draft will likely reach you Tuesday or Wednesday and if you pay it the overdraft created will be the limit to date of credit advanced this institution. Have Mr. Triplett ascertain the amount of the overdraft created if this draft is paid. If you do not pay it we are gone." (Tr., 231).

It needs no remark that this language is utterly incompatible with the notion that he had theretofore discussed the subject of the remittance and the draft over the telephone with the officers of the Trust Company.

Again, no other reason can be suggested for the Trust Company's refusal to pay the $51,000 draft than its decision to extend no further credit to the Central Bank, and its desire to apply the Bank's balance upon its existing indebtedness. Now, if the Trust Company had been informed by telephone at any time prior to the 25th of the source of the remittance and the outstanding draft, it is patent that as soon as it received the information it would have made the decision which it undisputedly did make on the 25th, when Buckholtz's letter was received, *viz.,* not to extend the additional credit which would be necessary if the draft were paid, and to apply the Central Bank's balance on its existing indebtedness. It is even more evident that, the decision reached, it would have paid no more of the Central

Bank's drafts, but would have at once applied the balance of its account on its indebtedness.

To put it shortly: When Buckholtz's letter was received on the 25th, self interest caused the Trust Company to decide that it would not pay the $51,000 draft when it was presented, and to apply the then existing balance of the Central Bank on its indebtedness. Had the information contained in that letter, or anything tantamount thereto, been earlier communicated by telephone, the same self interest would have caused the same decision as soon as the telephone message was received. Indeed, if the information had been communicated on the 21st, or at any time before the 25th, self interest would have been even more insistent in its promptings, for the balance of the Central Bank which could be applied on its indebtedness would then have been larger. The fact that the Trust Company continued to pay from the $48,000 remittance all drafts drawn by the Trust Company until the 25th, proves beyond question that it was not until that date that it was informed of the source of the $48,000 remittance and of the $51,000 draft.

It is said in the opinion handed down that the insolvency of the Central Bank was known to the officers of the Trust Company, and from that it may be argued that the latter was charged with notice that any money transmitted to it by the Central Bank was or might be impressed with a trust, and required to inquire into its antecedents before paying it out.

That certainly is not the law. Looking backward, the Central Bank is seen to have been insolvent for months before it closed its doors. During that time it was transacting its business in the usual manner, and entering into the customary engagements which all going banks must enter into. It did so under the sanction of the state banking department, which alone had authority to say when its operations were unsafe and compel it to cease business. The $48,000 remittance was made by it in the usual course of business, and there was nothing about it to create suspicion or cause inquiry. For months the Central Bank had been remitting daily large sums in drafts, checks, and other cash items, to the Trust Company, and paying its foreign, *i. e.,* other than local, debts by drafts drawn upon its account. Plaintiff itself put in evidence a day-by-day list of cash letters sent by the Central Bank to the Trust Company for credit during the months of October, November and December, 1920, and January, 1921. In October those remittances ran from $6,000 to $34,000 daily; in November from $3,000 to $26,000; in December from $1,000 to $15,000; and in January from $700 to $48,000. The total for the four months was over $1,000,000. (Trans., 92-93). In January there were a large number of cash remittances running from $4,000 to $7,000; two between $16,000 and $18,000; and a number of smaller ones (Trans., 140). These remittances were for the creation of an account against which the Central Bank could draw in payment of its obligations. The Trust Company

was its "principal and drawing correspondent"; nearly all drafts issued by the Central Bank were drawn upon the Trust Company except "when the remittance was in the extreme east or in California" (Trans., 96). From the 14th to the 27th of January the Trust Company paid the Seattle National Bank (payee of the $51,000 draft) alone approximately $47,000 in drafts drawn by the Central Bank (Trans., 140-141). Now, conceding that the officers of the Trust Company did know that the Central Bank was insolvent, what did their duty require of them? Bear in mind that in the State of Washington there is no other power than the state banking department that can determine that a state bank is insolvent and compel it to discontinue business. The courts are stripped of jurisdiction to interfere. Remington's Comp. Statutes 1922, §§3266, 3276. As the banking department sanctioned the Central Bank's continuance of business, how could the Trust Company question its right to continue? And what was the Trust Company required to do if it could question that right? Should it have proceeded on the theory that because the Central Bank was insolvent it had nothing but trust funds, and required the tracing of every remittance sent it, and of every draft drawn upon it, to the end that each draft should be paid from the particular fund upon which it was drawn? Manifestly nothing of that kind was possible. So long as the state banking department permitted the Central Bank to continue business, so long as it was conducting an ordinary banking busi-

ness and entering into ordinary banking engagements under authority of law, the Trust Company was bound to assume—unless directly informed to the contrary—that the Bank's engagements were lawful and that the money remitted was its money, which it had the lawful right to use in payment of any of its lawful debts. The case does not differ essentially from *McDonald v. Chemical Nat. Bank*, 174 U. S., 610, where the question was whether cash remittances made by an insolvent bank to another bank in the regular course of business should be treated as preferences in contemplation of insolvency. It was there said (p. 618) that:

> "It is matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided."

Now it will not do to set the transaction here involved by itself, as though it were the sole transaction of that character between the two banks, or as though there were something unusual inherent in it. Day after day for months the Central Bank had been remitting large sums to the Trust Com-

pany in checks and drafts. The remittance involved was of the usual character, differing only in that it was somewhat larger than the general run. The purpose of those remittances was to provide a fund for the payment of drafts drawn by the Central Bank in favor of third persons, to meet the engagements which every bank must make in the transaction of its regular, daily business. Without such a fund to draw on the Central Bank would have been obliged to forthwith suspend business. The refusal of the drawee to pay a single draft would have meant such an impairment of credit as to force suspension. As the remittances to the fund were made daily, so were the drafts drawn upon it made daily. There was nothing to connect the drafts with the remittances; nothing to indicate that one draft should of right be paid from a particular remittance while another was not entitled to be so paid. Of necessity all the remittances went into one general hotchpotch, from which all the drafts were paid in the order of their presentation. That being so, why was the Trust Company not warranted in treating this remittance as it did all the other remittances which it received from the Central Bank? Let us not confuse its right to apply this remittance upon the debt of the Central Bank to it with its right to use the remittance in paying drafts drawn by the Central Bank. The daily cash remittances, it may be conceded, were not intended to be used in paying the debt of the Central Bank to the Trust Company. Technically, no doubt, the Trust Com-

pany had the right, in the absence of explicit instructions to the contrary, to so use them, but the fact remains that the Central Bank did not expect they would be so used, but would be devoted to the payment of drafts drawn by it. There is, manifestly, a marked distinction between the Trust Company's use of the remittance in the payment of drafts in the regular course of business, in the manner it was intended to be used and as all remittances were used, and its use for the payment of a debt owing to the Trust Company.

Summing up, the point we now press upon the Court is that the Trust Company was warranted in paying the Central Bank's drafts out of the $48,000 remittance as they were presented without inquiring concerning the source of the remittance. The remittance was transmitted for credit precisely as all other remittances were. There was nothing to differentiate it from them; nothing to induce the belief that it was intended or ought to be set aside for a particular purpose. If the drafts of the Central Bank were to be paid as they were presented they had to be paid from that remittance. In illustration, the account of the Central Bank was overdrawn some $10,000 or $12,000 when the remittance was received. What was there to warn the Trust Company that the remittance, though made for the purpose of paying the drafts, generally, of the Central Bank, could not be used for that purpose, and if those drafts were paid the Trust Company must pay them from its own funds? On the

24th the Trust Company paid out of the remittance a draft for $17,798.38 drawn in favor of the Seattle National Bank by the Central Bank. How was the Trust Company to know that that draft ought to have been dishonored, and the $48,000 preserved intact to apply upon a subsequent draft in favor of the Seattle National Bank that was then in process of transmission? And obviously the Trust Company could not continue to act as correspondent for the Central Bank if it proceeded on the theory that the latter had no title to the cash remittances it was making daily, and that it was necessary to allocate remittances and drafts, so that if a remittance represented the proceeds of a particular collection, none but the draft issued in payment of that collection should be paid from that remittance. Refusal to pay a draft, unqualifiedly or until its antecedents were traced so that it could be determined whether there was a remittance from which it might properly be paid, would impair the credit and cause the suspension of the Central Bank. If it were the law that when a bank became embarrassed, no correspondent could safely receive remittances from or pay drafts drawn by it unless each draft was traced to the proper remittance and shown to be properly payable therefrom, there is no bank that could survive the least temporary embarrassment. As soon as its embarrassment was known it would become a pariah, with which no other bank would deal.

With respect to the drafts paid by it, the Trust

Company is unquestionably in the position of a purchaser for value of trust property. If it must lose the money it paid out, notice that the $48,000 remittance did not belong to the Central Bank must be imputed to the Trust Company. We know, as a matter of fact, that it had no such notice. If it were a question of using the remittance to pay the debt of the Central Bank to the Trust Company, it might well be assumed that, though it had notice, the latter was willing to take the chance of making the payment stick, for if it did not it would be in no worse position. Instead it is a question of paying out money to third persons, a transaction by which it could not gain, and by which it must lose if the remittance did not belong to the Central Bank. Obviously it had no notice or it would not have taken the chance involved in paying the drafts. Notice of a trust to the prejudice of a purchaser for value can never be imputed on suspicion. On this subject Mr. Justice Wolverton said in *Raymond v. Flavel* (Ore.), 40 Pac., 158, 166:

> "A court of equity acts upon the conscience, and it is upon the grounds of mala fides that a purchaser for value is affected with notice of a prior claim. The notice must be more than would excite the suspicion of a cautious and wary person. It must be so clear and undoubted, with respect to the existence of a prior right, as to make it fraudulent in him afterwards to take and hold the property. *Hall v. Livingston,* 3 Del. Ch. 348."

Such seems to be the general rule.

"Whilst it is held that the fact of notice may

be inferred from circumstances as well as proved by direct evidence, the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of *mala fides.* 3 Gratt. 494, 545, *Munday v. Vawter et als.* 2 Gratt. 280, 313, *McClanachan et als. v. Stiter, Price & Co.,* and 2 Johns. C. R., *Day v. Dunham,* 182. Professor Minor, in his admirable work, says the effect of the notice, which will charge a subsequest purchaser for valuable consideration, and exclude him from the protection of the registry law, is to attach to the subsequent purchaser the guilt of fraud. It is therefore, *never to be presumed,* but *must be proved,* and proved *clearly.* A mere suspicion of notice, even though it be a strong suspicion, will not suffice. 2 Min. Inst. 887, 2 edi., and cases cited."

Vest v. Michie, 31 Gratt., 149.

See also *Enes v. Pomeroy* (Ore.), 206 Pac., 860.

Where, may we ask, is there any ground for even suspecting *mala fides* on the part of the Trust Company in paying the drafts of the Central Bank? One does not enter into a fraudulent transaction, whereby one is exposed to a heavy loss, unless there is a prospect of such gain that one may afford to take the risk of loss. There was no possible gain for the Trust Company in paying the drafts. If it knew or even suspected that the remittance did not belong to the Central Bank, and could not be used in paying its drafts, it is self evident that no draft would have been paid therefrom.

It is quite true, as the court remarks, that a "serious injustice" resulted to the plaintiff from the transaction involved. But serious injustice must

result to every one who is dealing with an insolvent bank when it suspends payment. Either plaintiff or the Trust Company must lose the amount of the drafts that were paid to third persons from the $48,000 remittance. Upon which of them, in equity, should the loss fall? Let us balance their accounts and see.

The Trust Company acted in the utmost good faith in paying the drafts. It paid them in the regular course of business, in the same manner and from the same source that it had for months, perhaps years, been paying the drafts of the Central Bank. That it could not have suspected that it had no right to pay the drafts from the particular remittance is proven by the fact that it could not profit, and if its right to pay was in doubt could only lose, by making the payments. If the remittance was a trust fund, the trust upon which it was held was a secret one. And manifestly one will be protected who deals with trust property without notice of the secret trust by which it is affected.

Plaintiff entrusted the collection of its check unreservedly to its agent, the Seattle National Bank. It is, of course, chargeable with the result of its agent's acts. The Seattle National Bank might have directed that the proceeds of the collection be sent directly to it. Had that been done, no loss would have fallen upon any one. But the Central Bank was the regular correspondent and collecting agent at Yakima for the Seattle National Bank.

According to the regular course of dealing between the two, the Central Bank was authorized to mingle the proceeds of collections with its own funds, and settle therefor by a draft drawn upon its own funds in another bank—usually, if not always, the Trust Company. The regular course was pursued in the particular case, the Seattle National Bank having given no instructions to the contrary. The result was that there came into the hands of the Trust Company money which was *prima facie* the money of the Central Bank, which could properly be used as all money theretofore received from it had been: for the payment of any and all drafts drawn by it.

We submit that it was the act of plaintiff's agent in permitting the Central Bank to mingle the proceeds of the collection with its own funds, and settle therefor by a draft drawn upon its own funds which were deposited with the Trust Company, which rendered possible the loss that the Trust Company must sustain if the judgment of the District Court is affirmed, and it is not given credit for the drafts it paid before it was informed of the source of the $48,000 remittance. Plaintiff is responsible for the acts of its agent, for the Seattle National Bank was authorized to make the collection in any manner it saw fit. It is a "familiar principle 'that where one of two innocent persons must suffer by the acts of a third, he who has enabled such third persons to occasion the loss, must sustain it.' " *National Safe Deposit Co. v. Hibbs,* 229 U. S., 391, 394. Under that principle, as well as under the principle that

a purchaser for a valuable consideration is not affected by a secret trust of which he has no notice, the Trust Company ought to be given credit for the drafts it paid prior to the 25th.

Looking backward, from the viewpoint which this Court has taken of the law and facts involved in this case, the Trust Company is seen to have claimed more than its due when it insisted on its right to apply the balance remaining to the credit of the Central Bank on the 25th upon its debt to the Trust Company. That it did so may impeach the judgment of its counsel, but does not prove that its every action was inspired by bad faith. Because it claimed more than its due it cannot in justice be deprived of that which is its due. We therefore pray a rehearing, to the end that its right to a deduction of the drafts paid by it may be examined and, if equity so requires, the deduction be ordered made. Respectfully submitted,

F. H. GRAVES,
W. G. GRAVES,
B. H. KIZER,
Solicitors for Petitioner.

No. 3983

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SPOKANE & EASTERN TRUST COMPANY
(a corporation),
Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY
(a corporation),
Appellee.

APPELLEE'S REPLY TO APPELLANT'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 3983

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SPOKANE & EASTERN TRUST COMPANY
(a corporation),
Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY
(a corporation),
Appellee.

APPELLEE'S REPLY TO APPELLANT'S PETITION FOR A REHEARING.

Appellee, the Steel Company, after leave of Court first had and obtained, answers appellant's petition for rehearing and prays that the same be denied on the following grounds:

First. That the issues raised in said petition were fully considered and expressly decided by the Trial Court.

Second. That the questions raised by said petition were fully briefed, argued and submitted to this Court and were, moreover, expressly and specifically considered and decided in the opinion filed.

Third. That appellant received the fund in suit with full notice and knowledge of appellee's rights and title, and was, therefore, without right or authority to apply said fund to any use except the payment thereof to appellee.

Fourth. Appellant's claim is wholly without equity and constitutes an attempt to charge the payment of the drafts, mentioned in said petition, to appellee's fund instead of to remittances which it received for the express purpose of paying said drafts.

Argument in Support of Answer.

In the first place, attention is called to the decision of the Trial Court (Tr. 19) wherein it is said:

> "The funds thus transmitted to the Spokane and Eastern Trust Company by the Central Bank and Trust Company were so transmitted for the special purpose of providing the Spokane and Eastern Trust Company with funds with which to pay the draft and for no other purpose, *all of which was well known to the Spokane and Eastern Trust Company when such funds were received.*" (Italics ours.)

The Trial Court further finds that the proof fully sustains this allegation. (Tr. 20.)

The matters presented by appellant's petition were, moreover, reargued before the Trial Court between the time of filing the memorandum of decision and entry of the decree.

The point urged in the petition was also expressly decided in the opinion of this Court wherein it is said:

> "that those officials (of appellant) knew of the collection of the check, here involved, from the time it was in the hands of the Central Bank until the draft was dishonored by the Spokane Bank".

In the petition appellant expressly admits that if it had notice or knowledge of appellee's rights at the time it received the fund, the petition is without merit. It, therefore, follows that when both Courts expressly decided that appellant did have notice of appellee's rights at the time it received the fund, the only question to be determined is whether or not the evidence supports such a finding.

The proofs on this issue are not in the least complicated or difficult to understand and appreciate. They were, furthermore, fully reviewed and discussed in the briefs. It is, therefore, difficult to believe that both Courts could have fallen into error. The evidence supporting this issue is reviewed in sec. 14, pp. 62-67, appellee's brief, and shows appellant's knowledge from the beginning, through three of its agents and officials, first Buchholtz, its agent in full charge at Yakima (appellee's brief, sec. 12, pp. 40-54); second, Triplett, its vice-president, in charge of country banks at Spokane, through telephone and letters from Buchholtz, and third, Rutter, its president, through letter from Buchholtz.

Appellant's petition merely questions the knowledge of Triplett, overlooking the knowledge of Buchholtz. The knowledge of Triplett from the outset is, however, clearly established, twelve minutes on the telephone the day the remittance came in and another conversation the day appellant received the proceeds together with the surrounding circumstances detailed in appellee's brief, sec. 14, pp. 62-67.

The statement in the petition of witness Miner's testimony on cross-examination in nowise weakens or detracts from his testimony given on direct examination, as follows:

> "I asked him whether he had discussed this matter of this cash remittance letter and this draft and he said that he had discussed that matter with them over the long distance 'phone. * * * I brought the point out by a question to Buckholtz if he had informed the Spokane & Eastern Trust Company that the remittance that was made to it on the 21st by the Central Bank were the proceeds of those same collection items. He said he had communicated that information to them by long distance telephone." (Tr. 72, 73.)

The mere fact that Buchholtz did not fix the date of the telephone conversations is of no consequence; that fact is supplied by the telephone tags in evidence, referred to in the briefs and opinion of the Court.

The suggestion in the petition that the language of Buchholtz' letter to Rutter on the subject nega-

tives a prior telephone conversation is wholly without merit. The telephone conversations were with Triplett, and a perusal of the correspondence in the record demonstrates clearly that Buchholtz never at any time treated Triplett as a means of communication between himself and Rutter. For instance, in the above mentioned letter, we find Buchholtz conveying the same information to Rutter which he had previously written Triplett, and in so doing, writing as though he had never communicated such facts before. The whole correspondence shows Buchholtz regarded Triplett as his equal and Rutter as his immediate superior.

On pages 9 and 10 of the petition, appellant does indeed advance a most singular argument to disprove its knowledge of appellee's rights prior to January 25th. The argument is that appellant seized and converted the fund as soon as it learned that it belonged to appellee, and that if it had acquired such knowledge sooner it would have attempted to appropriate more of the fund to the Central Bank's indebtedness. True, enough, appellant admittedly showed absolutely no consideration for appellee's rights and acted in total disregard thereof, but it is difficult to see why a knowledge of appellee's ownership should have caused appellant to vary its conduct, or why it should have been more anxious to appropriate the funds of appellee than if they had actually belonged to the Central Bank. Obviously and admittedly, the fact is that the ownership of the fund and appellant's knowl-

edge thereof in nowise influenced its conduct, except, perhaps, to make it delay its final seizure for the reasons hereinafter stated.

Immediately upon receipt of the fund, appellant undertook to apply between $9000.00 and $10,000.00 to the Central Bank's overdraft (Tr. 111, 232); then on January 24, appellant paid two of the Central Bank's checks (Tr. 140, 141); and, finally, on the 25th appellant attempted to apply the balance of the fund to overdue rediscounts of the Central Bank returning such overdue paper to it (Tr. 22-24.)

If, as is admitted, appellant did not hesitate, with full knowledge, to use appellee's money to pay the Central Bank's indebtedness, why should it hesitate, with like knowledge, to honor the Central Bank's checks? The self-interest of appellant was the same whatever knowledge of the true ownership of the fund it may have had.

Assuming, as is admitted by appellant, that self-interest was appellant's sole actuating motive, two very good reasons appear why with full knowledge of appellee's rights appellant proceeded as it did. In the first place, the amount actually appropriated by appellant was, in all probability, sufficient to satisfy such self-interest, and in the language of Triplett was sufficient to put it in a position where it would not lose anything. (Tr. 226.) As already stated, the overdraft had already been satisfied and

the remaining indebtedness of the Central Bank was secured by collateral and by Bargehoorn's personal endorsement. (Tr. 138.) So far as the record shows appellant could not have used more of the fund than it did use. There is nothing in the record to show that the Central Bank's note secured by collateral was then past due, and, likewise, so far as the record shows, all past due rediscounts were charged back. A rediscount that was not past due could, of course, not be charged back. After making the charge back on the 25th there was still a balance of some two thousand dollars of the fund left. (Tr. 112, 113.) Undoubtedly, if there had been more past due rediscounts they would have been charged back.

Again, if appellant had desired to use more of the fund against the Central Bank's rediscounts it could not have safely done so sooner. The major portion of the fund, $45,000.00, consisting of a draft of the Yakima Valley Bank, drawn on the Bank of California at Tacoma, was not presented and honored until January 24th. (Tr. 36, 45.) If appellant had dishonored the Central Bank's checks prior to that time, such action would undoubtedly have resulted in stopping payment and dishonor of the $45,000.00 draft, and appellant's purposes would thereby have been defeated. It was, therefore, to appellant's self-interest to delay its action even at the expense of paying the Central Bank's checks in the meantime.

Possessed, as appellant was, with full knowledge of appellee's rights, it had absolutely no more right to use appellee's funds to pay the Central Bank's drafts than it had to apply them on the Central Bank's indebtedness. The drafts on their face disclosed that they were issued some time prior to the transaction here involved, and appellant was fully advised of the fact that they were in nowise chargeable to appellee's fund. The drafts of the Central Bank paid by appellant consisted of one for $17,700.00 issued January 18th, and paid January 24th and another for $1438.00 issued January 20th and paid January 24th. As appellant well knew, the Central Bank was without funds, begging to keep the small collections realized on its paper. It also knew that any large deposits which were made of necessity represented collection items, and that as soon as deposits were made drafts were immediately presented against them; in other words, it knew that such deposits were made for the specific purpose of meeting such drafts. (Tr. 140, 141.) Thus, on January 18th, when the Central Bank drew the $17,700 draft it deposited $16,818.00 with appellant to meet it, and in this instance Buchholtz so advised appellant by letter, referring to the deposit and requesting appellant to keep a stiff upper lip when the draft arrived. (Tr. 199.) Instead of holding this deposit to meet the draft, appellant applied the same to its overdraft, and now asks the Court to permit it to charge the draft so

paid to appellee's fund. There is absolutely no more reason for permitting such a thing to be done than there would have been for permitting appellant to keep the entire fund. The result is the same in both cases. Appellant has its claim against the Central Bank to reimburse it for the credit so extended. And as for equity, appellant knew the facts and, with its eyes open, voluntarily extended credit to the Central Bank. Appellee never gave the Central Bank any credit whatsoever, but merely used it as a collection agent. The Central Bank's indebtedness to appellant was not increased one penny as a result of the collection transaction here involved. Its indebtedness remained constant both as to rediscounts and overdraft. (Tr. 85, 87.) The decree, as made and affirmed, leaves appellant's indebtedness against the Central Bank in exactly the same position as if appellee's collection had never come into the hands of the Central Bank or appellant. Evenhanded justice has been done and the petition for rehearing should be denied.

Dated, San Francisco,
August 1, 1923.

Respectfully submitted,
WALTER SHELTON,
JOHN H. POWELL,
PETERS & POWELL,
Solicitors for Appellee.

No. 3985

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED CAUSES

UNITED STATES OF AMERICA,
Appellant,

vs.

BENEWAH COUNTY, IDAHO, A. C. WUNDERLICK, C. A. WALKER, W. R. ARMSTRONG, and F. H. TRUMMEL,

AND

KOOTENAI COUNTY, IDAHO, HANS JOHNSON, J. W. McCREA, FRANK A. MORRIS and S. H. SMITH,
Appellees.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

KENNARD-ANDERSON PRESS

FILED
FEB 20 1923
F. D. MONCKTON,

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED CAUSES

UNITED STATES OF AMERICA,
Appellant,

VS.

BENEWAH COUNTY, IDAHO, A. C. WUNDERLICK, C. A. WALKER, W. R. ARMSTRONG, and F. H. TRUMMEL,

AND

KOOTENAI COUNTY, IDAHO, HANS JOHNSON, J. W. McCREA, FRANK A. MORRIS and S. H. SMITH,
Appellees.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

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In the District Court of the United States in and for the District of Idaho, Northern Division.

UNITED STATES OF AMERICA,

Complainant,

vs.

BENEWAH COUNTY, IDAHO, A. C. WUNDERLICK, C. A. WALKER, W. R. ARMSTRONG AND F. H. TRUMMEL,

Defendants.

BILL OF COMPLAINT.

Complainant complains of the defendants above named and for cause of action alleges as follows:

I.

That this bill is brought by J. L. McClear, United States Attorney for the District of Idaho, acting in this behalf by direction of the Attorney General of the United States of America.

II.

That the defendant Benewah County is one of the legal subdivisions of the State of Idaho and is a body politic and corporate and vested with the power and authority delegated to it by the said state to assess, levy and collect, by its duly constituted and qualified officers, all state, county, municipal and special taxes upon property within said county not legally exempt from such taxation.

III.

That the defendants, A. C. Wunderlick, C. A. Walker, and W. R. Armstrong, are the duly elected, qualified and acting commissioners of said county, and as such constitute the Board of Commissioners thereof, and that the defendant, F. H. Trummel, is the duly elected, qualified and acting Assessor and Tax Collector of said county.

IV.

That heretofore, pusuant to the laws of the United States and the treaties then and now existing between the United States and the Coeur d'Alene tribe of Indians, there was allotted in severalty to one Morris Antelope, a member of said tribe and as such a ward of the United States, certain land lying within said county, and being a part of the Coeur d'Alene Indian reservation, to-wit, lots 1, 2, 3 and 4, section 24, township 45 north, range 6 west, Boise Meridian, containing 178.80 acres; that said land was at all times herein mentioned, and now is, held in trust by the United States for the said Morris Antelope, a ward of the United States as aforesaid, for the use and benefit of said ward according to the said laws and decrees, and as such is not, and was not, taxable by said county through its said officers.

V.

That heretofore, the said county acting by its said officials, commencing in the year 1917, and annually ever since then, has claimed and asserted a legal right to assess, levy and collect certain state, county, municipal and

special taxes upon and against the lands above described; that said county by its said officials has in each of said years made a purported and pretended assessment and levy of such taxes upon and against all of said lands and has attempted to enforce the collection and payment of such taxes, that acting agreeably to the mode and process set forth by the statutes of the State of Idaho, the said county by its said officials has advertised certain sales of said lands and of each tract and parcel of the same, from year to year, and has conducted purported and pretended sales of the same as advertised for the purpose of collecting pretended delinquent taxes levied upon said lands as aforesaid; that pursuant to said sales, said county by its said officials has issued certain certificates which purport and pretend to evidence the sale of said lands for pretended and delinquent taxes; that complainant and its attorney herein is informed and believes, and therefore alleges, that certain of said certificates are held by said county and certain others have been issued or assigned to certain individuals whose names are unknown.

VI.

That complainant herein and its said attorney are not informed as to the exact amount of said taxes and therefore the same are not stated.

VII.

That the said county and other defendants herein, acting as officials of said county, are threatening to, and

will, continue to assess and levy similar pretended taxes in each future year hereafter, and are threatening to, and will, continue to conduct pretended sales of said lands on account of said levies, and to issue certificates of a like nature as the other certificates hereinbefore referred to, and are threatening to, and will, execute and deliver tax deeds for said lands and each and every tract and parcel of the same to the holders or purchasers of said certificates already issued, which deeds will purport to convey to such holders or purchasers title to said land and to every part thereof in fee simple; that the proceedings already had by said county and through its said officials, and the threatened proceedings, all of which are hereinbefore fully set forth, do and will constitute a cloud upon the rightful and lawful title to said lands held in trust by the United States as aforesaid; that complainant herein and its said ward will suffer great and irreparable injury unless the same is prevented by the order and decree of this Honorable Court as herein prayed; that complainant and its said ward have no plain, speedy or adequate remedy at law in the premises.

WHEREFORE, complainant prays that the said assessments and levies of taxes already made against said lands be declared null and void; that it be decreed by this Honorable Court that each assessment and levy so made against said lands are illegal and of no effect; that each certificate of sale and each deed executed pursuant to any such sale, whether now outstanding or hereafter to be

made and given, is null and void and that each of the same be delivered up for cancellation and be thereupon cancelled by order of this Court; that the defendants herein and their successors in office be enjoined and restrained from taking further proceedings under said assessments and levies of taxes already made, and be enjoined and restrained from further assessing or levying taxes against said lands or any part thereof at any future time so long as complainant may hold its present title to said lands or any part thereof;

That it be further adjudged, ordered and decreed that the defendants have no estate, right title or interest whatever in or to said lands or any part thereof, and that the defendants and all of them be forever debarred and enjoined from asserting any claim whatever in or to said premises adverse to the rights, title and interest of this complainant and its said ward in and to said lands, and that defendants be forever restrained from disposing or attempting to dispose of any pretended interest that they may claim in or to said lands.

Complainant further prays for such other and further relief in the premises as may seem equitable, together with complainant's costs herein laid out and expended.

J. L. McCLEAR,

United States Attorney for the District of Idaho.

STATE OF IDAHO,
County of Ada, } ss.

J. L. McClear, being first duly sworn, deposes and says that he is attorney for the complainant in the above entitled cause; that he has read the foregoing bill of complaint, and that he believes the facts stated therein to be true.

J. L. McCLEAR.

Subscribed and sworn to before me this 29th day of December, 1921.

W. D. McREYNOLDS,
(Seal) *Clerk, U. S. District Court.*
By PEARL E. ZANGER,
Deputy Clerk.

Endorsed, Filed Dec. 29, 1921.
W. D. McREYNOLDS, Clerk.
By PEARL E. ZANGER, Deputy.

(Title of Court and Cause)

No. 781

ANSWER

Now comes the above named defendants and for answer to the complaint of plaintiff herein, alleges:

I.

Defendants admit the allegations of Paragraph I of plaintiff's complaint.

II.

Defendants admit the allegations of Paragraph II of plaintiff's complaint.

III.

Defendants admit the allegations of Paragraph III of plaintiff's complaint.

IV.

Answering Paragraph IV of plaintiff's complaint, defendants admit that heretofore pursuant to the laws of the United States and the treaties then and now existing between the United States and the Coeur d'Alene tribe of Indians, there was allotted in severalty to one Morris Antelope, a member of said tribe, and as such a ward of the United States, certain lands lying within said county, and being a part of the Coeur d'Alene Indian Reservation, to-wit, Lots One (1), Two (2), Three (3) and Four (4), Section 4, Township 45 North, Range 6 West, Boise Meridian, containing 178.80 acres, but deny that said land was at all times hereinafter mentioned, or now is, or at any time hereinafter mentioned subsequent to the year 1916, held in trust by the United States for the said Morris Antelope, a ward of the United States as aforesaid, for the use or benefit of said ward, or otherwise according to said laws or decrees, or otherwise, or at all, or that such is not, or was not, taxable by said county through its said officers.

V.

Answering Paragraph V of plaintiff's complaint, defendants admit that the said county acting by said offi-

cials, commencing in the year 1917, and annually ever since then, up to but not including the year 1921, has claimed and asserted a legal right to assess, levy and collect certain state, county, municipal and special taxes upon and against the lands above described, and that said county by said officials has in each of said years made an assessment and levy of such taxes upon and against all of said lands and premises and has attempted to enforce the collection and payment of such taxes, and that acting agreeably to the mode and process set forth by the statutes of the State of Idaho, the said county by its said officials has advertised certain sales of said lands and of each tract and parcel of the same, from year to year, and has conducted sales of the same as advertised for the purpose of collecting delinquent taxes levied upon said lands aforesaid, and that pursuant to said sales said county by its officials has executed certain certificates to evidence the sale of said lands for said delinquent taxes, and that certain of said certificates are held by said county, and certain others have been issued or assigned to certain individuals whose names are unknown.

VI.

Defendants admit the allegations of Paragraph VI of said complaint.

VII.

Answering Paragraph 7 of said complaint defendants deny that the said county, or other defendants herein, or any of them, acting as said officials of said county, or oth-

erwise, are threatening to or will continue to assess or levy similar or other pretended taxes in each or any future year hereafter, or are threatening to or will continue to conduct pretended sales or any sales of said lands on account of said levies, or to issue certificates of a like nature as the other certificates hereinbefore referred to; deny that complainant herein or its ward, will suffer great or irreparable, or any injury unless the same is prevented by order or decree of this honorable court, and deny that complainant or its said ward has no speedy, plain or adequate remedy at law in the premises.

And for another, further and affirmative answer to plaintiff's complaint, defendants allege:

I.

That during the year 1916, or prior thereto, Morris Antelope was duly and regularly declared by the Commissioner of Indian Affairs, to be competent, and in the year 1916, there issued to said Morris Antelope from the United States government, a patent in fee to Lots 1, 2, 3 and 4, Section 24, Township 45 North, Range 6 West, Boise Meridian, containing 178.80 acres.

II.

That pursuant to the statutes of the State of Idaho, in such cases made and provided, said land was duly and regularly assessed for taxes for the years 1917, 1918. 1919 and 1920, and during said years the said Morris Antelope was holding said lands and premises in fee simple,

and the order or judgment of the said Commissioner of Indian Affairs adjudging him competent had never been revoked.

III.

That the said Morris Antelope did not, nor did anyone on his account or in his behalf, pay the said taxes assessed upon said lands and premises for the years 1917, 1918, 1919 or 1920, except taxes for the year 1917, which were paid under protest by the Indian Agent of the Coeur d'Alene Indian Reservation for and on behalf of the said Morris Antelope.

IV.

That the said lands and premises were duly and regularly sold for the taxes for the years 1918, 1919 and 1920, the certificate of sale for the taxes of 1918, were issued to some party to defendants unknown, and the certificates for the taxes for the years 1919 and 1920, were duly and regularly issued to Benewah County, who is now the owner and holder of the same.

V.

That in the year 1921, the United States, for some reason unknown to defendants, or either of them, revoked the patent heretofore issued to Morris Antelope, and taxes were not levied or assessed on account of said lands and premises for the year 1921.

VI.

That the moneys collected by reason of the sale of said lands and premises for delinquent taxes and the taxes

collected for the year 1917, have been apportioned and paid to the State of Idaho, and should plaintiff recover the taxes paid on behalf of said Morris Antelope, or should said tax certificates be cancelled and annulled, the said Benewah County could not recover the moneys arising from said taxes and sales and apportioned and paid to the State of Idaho.

WHEREFORE defendants pray that this action be dismissed, plaintiff take nothing by its complaint, and the defendants recover their costs in this behalf laid out and expended.

ROBT. E. McFARLAND,
Attorney for Defendants,
Residence and P. O. Address:
St. Maries, Idaho.

State of Idaho,
County of Benewah. } ss.

F. H. TRUMMEL, being first duly sworn, deposes and says:

That he is one of the defendants in the foregoing and above entitled action; that he makes this affidavit for and on behalf of all of the defendants, for the reason that he is familiar with the facts set forth in the foregoing answer; that he has read the within and foregoing answer. knows the contents thereof and that he believes the facts therein stated to be true.

F. H. TRUMMEL,

Subscribed and sworn to before me this 25th day of February, A. D. 1922.

(Seal) ROBT. E. McFARLAND,
Notary Public in and for the State of Idaho, residing at St. Maries, Benewah County.

Endorsed.
Filed Feb. 27, 1922.
W. D. McREYNOLDS,
Clerk.
By L. M. LARSON,
Deputy.

(Title of Court and Cause)

No. 781

ORDER.

WHEREAS in the above entitled action, the facts involved having been stipulated and agreed upon by the complainant and defendants by and through their respective counsel, and it appearing that the above entitled action may properly be consolidated with the case of United States of America, Complainant, vs. Kootenai County, Idaho, Hans Johnson, J. W. McCrea, Frank A. Morris and S. H. Smith, Defendants, now pending in the above entitled court.

WHEREFORE, upon motion of the parties hereto, by and through their respective counsel, it is hereby OR-

DERED and this does order that the above entitled action be consolidated with that of the United States vs. Kootenai County, Idaho, Hans Johnson, J. W. McCrea, Frank A. Morris and S. H. Smith.

Done in open court at Coeur d'Alene, Kootenia County, Idaho, this 22nd day of May, 1922.

FRANK S. DIETRICH,

Judge of the District Court of the United States of America in and for the District of Idaho, Northern Division.

Endorsed. Filed May 22, 1922.

W. D. McREYNOLDS,

Clerk.

(Title of Court and Cause)

No. 781.

DECREE.

This cause came on to be heard at a previous stated term, E. G. Davis, United States District Attorney, appearing as solicitor for plaintiff, and Robert E. McFarland, County Attorney of the defendant county, appearing as solicitor for the defendants, and a written stipulation of facts having been signed and filed, covering the issues both in this case and No. 782, consolidated therewith for convenience of trial, and the cause having been submitted upon said stipulation, together with the ex-

hibits and pleadings, and upon written briefs, and, upon consideration, it having been held that upon such record the facts therein disclosed do not entitle the plaintiff to any relief, as appears from the written opinion heretofore filed herein and in said companion case, No. 782.

Now therefore, in consideration of the premises, it is ordered and decreed that the above-entitled cause be, and the same is, hereby dismissed, with prejudice, but without costs.

Dated this 27th day of November, 1922.

FRANK S. DIETRICH,
District Judge.

Endorsed. Filed Nov. 27, 1922.
W. D. McREYNOLDS,
Clerk.

In the District Court of the United States in and for the District of Idaho, Northern Division.

UNITED STATES OF AMERICA,
Complainant,

vs.

KOOTENAI COUNTY, IDAHO, HANS JOHNSON, J. W. McCREA, FRANK A. MORRIS and S. H. SMITH,
Defendants.

No. 782.

BILL OF COMPLAINT

Complainant complains of the defendants above named and for cause of action alleges as follows:

I.

That this bill is brought by J. L. McClear, United States Attorney for the District of Idaho, acting in this behalf by direction of the Attorney General of the United States of America.

II.

That the defendant Kootenai County is one of the legal subdivisions of the State of Idaho and is a body politic and corporate and vested with the power and authority delegated to it by the said state to assess, levy and collect by its duly constituted and qualified officers, all state, county, municipal and special taxes upon property within said county not legally exempt from such taxation.

III.

That the defendants, Hans Johnson, J. W. McCrea and Frank A. Morris, are the duly elected, qualified and acting commissioners of said county, and as such constitute the Board of Commissioners thereof, and that the defendant, S. H. Smith, is the duly elected, qualified and acting assessor and tax collector of said county.

IV.

That heretofore, pursuant to the laws of the United States and the treaties then and now existing between the

United States and the Coeur d'Alene tribe of Indians, there was allotted in severalty to one Anasta Williams Smo, a member of said tribe and as such a ward of the United States, certain land lying within said county, and being a part of the Coeur d'Alene Indian Reservation, to-wit, the north half (N½) of section twenty (20), township forty-seven (47) north, range five (5) west, Boise Meridian, containing one hundred sixty (160) acres; that said land was at all times herein mentioned, and now is, held in trust by the United States for the said Anasta Williams Smo, a ward of the United States as aforesaid, for the use and benefit of said ward according to the said laws and decrees, and as such is not, and was not, taxable by said county through its said officers;

V.

That heretofore, the said county acting by its said officials, commencing in the year 1917, and annually ever since then, has claimed and asserted a legal right to assess, levy and collect certain state, county, municipal and special taxes upon and against the lands above described; that said county by its said officials has in each of said years made a purported and pretended assessment and levy of such taxes upon and against all of said lands and has attempted to enforce the collection and payment of such taxes, that acting agreeably to the mode and process set forth by the statutes of the State of Idaho, the said county by its said officials has advertised certain sales of said lands and of each tract and parcel of

the same, from year to year, and has conducted purported and pretended sales of the same as advertised for the purpose of collecting pretended delinquent taxes levied upon said lands as aforesaid; that pursuant to said sales, said county by its said officials has issued certain certificates which purport and pretend to evidence the sale of said lands for pretended and delinquent taxes; that complainant and its attorney herein is informed and believes, and therefore alleges, that certain of said certificates are held by said county and certain others have been issued or assigned to certain individuals whose names are unknown.

VI.

That complainant herein and its said attorney are not informed as to the exact amount of said taxes and therefore the same are not stated.

VII.

That the said county and other defendants herein, acting as officials of said county, are threatening to, and will, continue to assess and levy similar pretended taxes in each future year hereafter, and are threatening to, and will, continue to conduct pretended sales of said lands on account of said levies, and to issue certificates of a like nature as the other certificates hereinbefore referred to, and are threatening to, and will, execute and deliver tax deeds for said lands and each and every tract and parcel of the same to the holders or purchasers of said certificates already issued, which deeds will purport to convey

to such holders or purchasers title to said land and to every part thereof in fee simple; that the proceedings already had by said county and through its said officials, and the threatened proceedings, all of which are hereinbefore fully set forth, do and will constitute a cloud upon the rightful and lawful title to said lands held in trust by the United States as aforesaid; that complainant herein and its said ward will suffer great and irreparable injury unless the same is prevented by the order and decree of this Honorable Court as herein prayed; that complainant and its said ward have no plain, speedy or adequate remedy at law in the premises.

WHEREFORE, complainant prays that the said assessments and levies or taxes already made against said lands be declared null and void; that it be decreed by this Honorable Court that each assessment and levy so made against said lands are illegal and of no effect; that each certificate of sale and each deed executed pursuant to any such sale, whether now outstanding or hereafter to be made and given, is null and void and that each of the same be delivered up for cancellation and be thereupon cancelled by order of this Court; that the defendants herein and their successors in office be enjoined and restrained from taking further proceedings under said assessments and levies of taxes already made, and be enjoined and restrained from further assessing or levying taxes against said lands or any part thereof at any future time so long as complainant may hold its present title to said lands or any part thereof;

That it be further adjudged, ordered and decreed that the defendants have no estate, right, title or interest whatever in or to said lands or any part thereof, and that the defendants and all of them be forever debarred and enjoined from asserting any claim whatever in or to said premises adverse to the rights, title and interest of this complainant and its said ward in and to said lands, and that defendants be forever restrained from disposing or attempting to dispose of any pretended interest that they may claim in or to said lands.

Complainant further prays for such other and further relief in the premises as may seem equitable, together with complainant's costs herein laid out and expended.

J. L. McCLEAR,
United States Attorney for the District of Idaho.

STATE OF IDAHO,
County of Ada. } ss.

J. L. McClear, being first duly sworn, deposes and says that he is attorney for the complainant in the above entitled cause; that he has read the foregoing bill of complaint, and that he believes the facts stated therein to be true.

J. L. McCLEAR,

Subscribed and sworn to before me this 29th day of December, 1921.

W. D. McREYNOLDS,
Clerk, U. S. District Court.
(Seal) By PEARL E. ZANGER,
Deputy.

Endorsed, filed Dec. 29, 1921.
W. D. McREYNOLDS,
Clerk.
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause)

No. 782.

ANSWER.

Come now the above named defendants and answering the complaint in the above entitled action deny, allege and affirm as follows, to-wit:

I.

Defendants admit Paragraphs I and II of said complaint as fully as though herein set forth in full.

II.

Answering Paragraphs III of plaintiff's complaint defendants admit that Hans Johnson, J. W. McCrea and Frank A. Morris are the duly elected, qualified and acting commissioners of said county and as such constitute

the board of county commissioners thereof, and admit the defendant, S. H. Smith is the duly elected, qualified and acting assessor of said county, but deny that said S. H. Smith is the duly elected, qualified or acting tax collector of Kootenai County.

III.

Answering Paragraph IV of said complaint defendants admit that heretofore, pursuant to the laws of the United States and the treaties then and now existing between the United States and the Coeur d'Alene tribe of Indians, there was allotted in severalty to one Anasta Williams Smo, a member of said tribe and as such a ward of the United States, certain land lying within said county, and being a part of the Coeur d'Alene Indian Reservation, to-wit, the north half (N½) of section twenty (20), township forty-seven (47) north, range five (5) west, Boise meridian, containing one hundred sixty (160) acres. Defendants deny that said land was at all times herein mentioned and now is, held in trust by the United States for the said Anasta Williams Smo, ward of the United States as aforesaid, for the use and benefit of said ward according to said laws and decrees and deny that as such the same is not, and was not taxable by said county through its said officers.

IV.

Answering Paragraph V, defendants admit that heretofore the said county acting by its said officials commencing in the year 1917 and annually ever since then

has claimed and asserted a legal right to assess, levy and collect certain state, county, municipal and special taxes upon and against the land above described, and deny that said county by its said officials has in each of said years made a purported or pretended assessment and levy of such taxes upon and against all of said lands, and allege that a valid and lawful assessment and levy of such taxes was made upon and against all of said lands and has attempted to enforce the collection and payment of said taxes and that acting agreeably to the mode and process set forth by the Statutes of the State of Idaho, the said county by its said officials has advertised certain sales of said lands and of each tract and parcel of the same from year to year, and deny that said county has conducted purported or pretended sales of the same as advertised for the purpose of collecting pretended delinquent taxes levied upon the land as aforesaid, and alleges the fact to be that said county has conducted lawful and valid sales of the same for the purpose of collecting lawful and valid delinquent taxes levied upon said lands as aforesaid; that, pusuant to said sales, said county, by its said officials has issued certain certificates which purport and pretend to and in truth and in fact do evidence the sale of said lands for said delinquent taxes and defendants deny that said certificates so issued merely purport or pretend to evidence the sale of said lands and deny that the same are for pretended delinquent taxes. Defendants admit that certain of said certificates are held by said county and that certain others have been issued or as-

signed to certain individuals but deny sufficient knowledge or information upon which to form a belief whether or not the names of such individuals are known to complainant or to complainant's attorney herein and, therefore, deny the same.

V.

Answering Paragraph VI of said complaint defendants allege that the exact amount of said taxes and each and every item thereof constitute a part and portion of the public records of Kootenai County, Idaho, and, therefore, deny that complainant herein or its attorney are not informed as to the exact amount of said taxes.

VI.

Answering Paragraph VII defendants deny that the said county and other defendants herein acting as officials of said county are threatening to and will continue to assess and levy similar pretended taxes in each future year hereafter and allege that said defendants will continue to assess and levy similar valid and lawful taxes so long as they have the lawful right so to do and defendants deny that they are threatening to or will continue to conduct pretended sales of said lands on account of said levies and allege that they will so long as they have the legal right so to do, conduct valid and lawful sales of said lands on account of said lawful and valid levies and issue certificates of a like nature as the other certificates hereinbefore referred to and so long as they have the lawful right so to do will execute and deliver tax deeds for said

lands and each and every tract or parcel of the same to the owners or purchasers of said certificates already issued which said deeds will purport to and will, in fact, convey to such holders or purchasers title to said land and to every part thereof in fee simple. Defendants deny that the proceedings already had by said county and through its said officials or the threatened proceedings or any other proceedings had or threatened or proposed or any of which are hereinbefore in said complaint fully or otherwise set forth, do or will, constitute a cloud upon the rightful and lawful title to said lands held in trust by the United States as aforesaid or otherwise and allege that said proceedings herein had, or in contemplation, do and will effect the title to the lands of Anasta Williams Smo held in severalty by him.

Defendants deny that complainant herein or its said alleged ward will suffer great or irreparable or any injury unless the same is prevented by order and decree of this Honorable Court as in said complaint prayed, and deny that complainant or its said ward have no plain, speedy or adequate remedy at law in the premises, and allege that Anasta Williams Smo, the alleged ward of complainant, has a plain, speedy and adequate remedy at law in the payment of the taxes and assessments legally levied, assessed and imposed upon said lands by the said Kootenai County, Idaho, and its said officers in pursuance of the laws of the State of Idaho.

Furthering answering plaintiff's complaint and by way

of affirmative answer defendants deny, allege and affirm as follows, to-wit:

I.

Defendants admit that for some time prior to the time when the lien of tax for the year 1917 attached to real estate in Kootenai County, Idaho, in conformity with the laws of Idaho, said Anasta Williams Smo was a ward of the United States and held as an allotment the land in the complaint herein described, but that some time prior to the year 1917, the exact date of which is unknown to these defendants, patent to said land issued to the said Anasta Williams Smo from the United States and thereupon said Anasta Williams Smo became and was the owner in fee simple of the lands in said patent described and that thereupon the same were assessed for taxes by the proper officers of Kootenai County, Idaho, in conformity with the laws of Idaho and that the same have been so assessed and other proceedings held as provided by the laws of Idaho for the levying and collection of taxes.

II.

That during the year 1917 it became necessary and expedient to construct a public highway across the above described land and an attempt to secure right of way therefor from said Anasta Williams Smo in an amicable manner and to adjust the reasonable value thereof with the said Anasta Williams Smo was made by the proper officers of Kootenai County, Idaho, without success, whereupon an action to condemn said right of way in ac-

cordance with the laws of Idaho was instituted in the District Court of the Eighth Judicial District in and for the State of Idaho, County of Kootenai, in which said action Kootenai County, a municipal corporation, was plaintiff and Anasta Williams Smo was defendant and that appraisers were in due course appointed and fixed the award of damages to be paid said Anasta Williams Smo in the sum of One Hundred Forty Dollars ($140.00), which said sum was in due course paid by said Kootenai County on the 9th day of May, 1918, to said Anasta Williams Smo and that in addition to the said sum of One Hundred Forty Dollars ($140.00) Kootenai County, Idaho, was required to, and did pay and sustain the costs of said action in the sum of.....
amounting in all to the sum of $140.00 with interest thereon at the rate of 7% per annum from and after the 9th day of May, 1918; that said proceeding was had and said payments made by the said Kootenai County in the bona fide belief and assumption that said land was owned by Anasta Williams Smo in fee simple and he was dealt with according to the law and practice of the State of Idaho providing for the condemnation of public right of way across the land of citizens of Idaho, and had said Anasta Williams Smo at said time been a bona fide ward of the United States and the said described land held for said Anasta Williams Smo as such ward said right of way could undoubtedly have been secured without the necessity of said condemnation action or the losses to said Kootenai County in payments and costs through said ac-

tion sustained; that no part of said sum so expended by Kootenai County has ever been paid or tendered to Kootenai County by said Anasta Williams Smo or by anyone in his behalf and said Kootenai County is at this time damaged in the said sum as hereinbefore set forth with interest thereon at the rate of 7% per annum from the date of payment thereof.

WHEREFORE defendants pray judgment against plaintiff that:

I.

That plaintiff take nothing by said action and for defendants' costs and disbursements herein expended.

II.

That this Honorable Court make and enter findings and judgment herein that the patent heretofore issued to said Anasta Williams Smo then and there conveyed said land to said Anasta Williams Smo in fee simple and that the same then and there became subject to the assessment, levy and collection of taxes under the laws of the State of Idaho, and that dfendants were within their lawful rights in so levying, assessing and attempting to collect said taxes.

III.

Defendants further pray that in the event that this Honorable Court should find and determine said property was not subject to said taxes then, and in that event, that said Anasta Williams Smo, the alleged ward of plaintiff, be required to refund to and reimburse Kootenai County,

Idaho, in the sum of $140.00, being the amount paid same Anasta Williams Smo by said Kootenai County for said right of way, together with costs and interest thereon.

IV.

For such other and further relief as to the Honorable Court shall seem just and equitable in the premises and for general relief.

ROGER G. WEARNE,
Prosecuting Attorney of Kootenai County, Idaho,
Attorney for Defendants.
Residence and Postoffice Address,
Coeur d'Alene, Idaho.

STATE OF IDAHO,
County of Kootenai. } ss.

Hans Johnson, being first duly sworn, deposes and says:

That he is the Chairman of the Board of County Commissioners of Kootenai County, Idaho, one of the defendants in the above entitled action and that he makes this verification for and on behalf of all of said defendants; that he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

HANS JOHNSON.

Subscribed and sworn to before me this 30th day of January, 1922.

ROGER G. WEARNE,
(Seal) Notary Public for Idaho,
Residing at Coeur d'Alene, Idaho.

Endorsed. Filed Feb. 4, 1922.
W. D. McREYNOLDS,
Clerk.

By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause)

No. 782

ORDER.

WHEREAS in the above entitled action, the facts involved having been stipulated and agreed upon by the complainant and defendants by and through their respective counsel, and it appearing that the above entitled action may properly be consolidated with the case of United States of America, Complainant, vs. Benewah County, Idaho, A. C. Wunderlick, C. A. Walker, W. R. Armstrong and F. H. Trummel, Defendants now pending in the above entitled court.

WHEREFORE, upon motion of the parties hereto, by and through their respective counsel, it is hereby ORDERED and this does order that the above entitled ac-

tion be consolidated with that of the United States vs. Benewah County, Idaho, A. C. Wunderlick, C. A. Walker, W. R. Armstrong and F. H. Trummel.

DONE IN OPEN COURT at Coeur d'Alene, Kootenai County, Idaho, this 22nd day of May, 1922.

FRANK S. DIETRICH,

Judge of the District Court of the United States of America, in and for the District of Idaho, Northern Division.

Endorsed, Filed May 22, 1922.
W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause)

No. 782

DECREE.

This cause came on to be heard at a previous stated term, E. G. Davis, United States District Attorney, appearing as solicitor for plaintiff, and Roger G. Wearne, County Attorney of the defendant county, appearing as solicitor for the defendants, and a written stipulation of facts having been signed and filed, covering the issues both in this case and No. 781, consolidated therewith for convenience of trial, and the cause having been submitted upon said stipulation, together with the exhibits and pleadings, and upon written briefs, and, upon considera-

tion, it having been held that upon such record the facts therein disclosed do not entitle the plaintiff to any relief, as appears from the written opinion heretofore filed herein and in said companion case No. 781.

Now, therefore, in consideration of the premises, it is ordered and decreed that the above-entitled cause be, and the same is, hereby dismissed, with prejudice, but without costs.

Dated this 27th day of November, 1922.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed Nov. 27, 1922.
W. D. McREYNOLDS,
Clerk.

CONSOLIDATED CAUSES

Nos. 781 and 782.

STIPULATION OF FACTS.

Come now the above entitled parties in the above entitled action, by and through their respective counsel, the actions of the United States of America vs. Kootenai County, Idaho, Hans Johnson, J. W. McCrea, Frank A. Morris and S. H. Smith, and of the United States of America vs. Benewah County, Idaho, A. C. Wunderlick, C. A. Walker, W. R. Armstrong and F. H. Trummel, having been consolidated, and stipulate as follows:

I.

That pursuant to the laws of the United States and the treaties then and now existing between the United States and the Coeur d'Alene tribe of Indians, a trust patent was issued to one Morris Antelope, a member of said tribe, to certain land lying within Benewah County, Idaho, and being a part of the Coeur d'Alene Indian Reservation, to wit, Lots 1, 2, 3 and 4, Section 24, Township 45 North, Range 6 West Boise Meridian, containing 178.80 acres, and that in the same year a trust patent was issued to one Anasta Williams Smo, a member of the said Coeur d'Alene tribe of Indians, to certain land within Kootenai County, Idaho, and being a part of the Coeur d'Alene Indian Reservation, to wit, the North Half (N½) of Section Twenty (20), Township 47 North, Range 5 West, Boise Meridian, containing 160 acres.

II.

That in the year 1916 the said Morris Antelope and the said Anasta Williams Smo were duly and regularly declared by the Secretary of Interior to be competent and in the year 1916 there issued to the said Morris Antelope and to the said Anasta Williams Smo patents in fee to the above described lands.

III.

That the said Morris Antelope and the said Anasta Williams Smo refused to accept said patents in fee at the time they were issued and still continue to refuse to accept the same.

IV.

That pursuant to the statutes of the State of Idaho the said lands were duly and regularly assessed for taxes for the years 1917, 1918, 1919 and 1920 and that during said years the order or judgment of the said Secretary of the Interior adjudging said Indians competent had never been revoked and that said fee patents of said Indians during all of said time had never been revoked and were held subject and ready for delivery but said Indians refused to accept same. That on or about January 6, 1921, the Secretary of the Interior did revoke the fee patents theretofore issued to said Indians but which said Indians had refused to accept.

V.

That the 1917 tax on the land of Morris Antelope, amounting to $272.41, has been paid to the proper officer of Benewah County, Idaho, under protest, and the 1917 taxes on the land of Anasta Williams Smo, amounting to $325.62, was paid to the proper officer of Kootenai County, Idaho, under protest. That there remains due, unpaid and delinquent under said assessment for the years 1918, 1919 and 1920 upon the land of Morris Antelope the sum of $1264.81, and there remains due, unpaid and delinquent under said assessment for the years 1918, 1919 and 1920 upon the land of Antasta Williams Smo $810.20, for which delinquent certificates have been issued and are outstanding, agreeable to the law and practice of the State of Idaho in such case made and provided.

In January, 1921, due notice was filed in the County Assessor's offices of Kootenai and Benewah Counties, respectively, of the cancellation of said patents by the Secretary of the Interior and no assessments of taxes subsequent to that date have been made.

VI.

That said Indians have never alienated or attempted to alienate any of said lands with the exception of Morris Antelope's having sold to Benewah County, Idaho, and executed deed for same, a right of way for public highway for the considerationo of $125.00, subsequent to the issue of the fee patent and prior to the cancellation thereof, and condemnation for right of way for public highway across the herein described lands of Anasta Williams Smo was had through the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai, and the sum of $140.00 through said action paid to same Smo for right of way for said public highway. That in said condemnation action the said Anasta Williams Smo was dealt with as a citizen Indian and condemnation of right of way was carried on according to the law of Idaho in such case made and provided.

VII.

That between the years 1916 and 1921 the Department of the Interior treated the said Morris Antelope and Anasta Williams Smo as citizen Indians and that the defendants proceeded upon said assumption in their actions herein involved.

VIII.

The purpose of this action is to determine the legality of the asseessment and collection of these taxes and the status of the Indians from the time of the issuance of the patent in fee in 1916 until the time of the cancellation in January, 1921, and their status at the present time, and also the legality of the proceedings under which rights of way for public highway were secured.

Dated this 22nd day of May, 1922.

E. G. DAVIS,
FRED CRANE,
United States District Attorneys.
ROBT. E. McFARLAND,
Prosecuting Attorney Benewah County, Idaho.
ROGER G. WEARNE,
Prosecuting Attorney Kootenai County, Idaho.

Endorsed. Filed May 22, 1922.
W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause.)

CONSOLDIATED CAUSES
Nos. 781 and 782.
SUPPLEMENTAL STIPULATION OF FACTS.

Supplemental to the stipulation of facts heretofore entered into in the above entitled cause of action, it is further stipulated as follows:

I.

That the trust patent issued to Morris Antelope, as recited in paragraph I of the stipulation of facts heretofore entered into in this cause, was signed on the 16th day of December, 1909.

II.

That the trust patent similarly shown to have been issued to Anasta Williams Smo was signed on the 16th day of December, 1909.

III.

That the granting language of said trust patents, omitting the name of the trust patentee, is as follows:

WHEREAS, There has been deposited in the General Land Office of the United States a schedule of allotments approved by the Secretary of the Interior July 13, 1909, whereby it appears that....., an Indian of the Coeur d'Alene tribe or band, has been allotted the following described land:

.....

.....

"NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said....., the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said In-

dian, and at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free from all charge and incumbrance whatsoever, if said Indian does not die before the expiration of the said trust period; but in the event said Indian does die before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said land, or cause said land to be sold for the benefit of said heirs as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States."

Dated this 19th day of August, 1922.

E. G. DAVIS,
United States Attorney for the District of Idaho.

ROBT. E. McFARLAND,
Prosecuting Attorney for Benewah County, Idaho.

ROGER G. WEARNE,
Prosecuting Attorney for Kootenai County, Idaho.

Endorsed. Filed Sept. 15, 1922.
W. D. McREYNOLDS,
Clerk.

DEPARTMENT OF THE INTERIOR
Office of Indian Affairs.

Washington, September 6, 1922.

I, E. B. Merritt, Assistant Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

(Seal) E. B. MERRITT,
Assistant Commissioner.

THE SECRETARY OF THE INTERIOR
WASHINGTON

February 10, 1919.

Dear Judge Sells:

Please look over this memorandum which I have requested from Mr. Mundell, and come to me some day this week with your comments on it. I look favorably upon his suggestions.

Cordially yours,
FRANKLIN K. LANE.

Hon. Cato Sells,
Commissioner of Indian Affairs.

5-1100

Refer in reply to the following:

Address only the Commissioner of Indian Affairs.

DEPARTMENT OF THE INTERIR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

March 7, 1919.

(Copies of this letter was mailed to all Superintendents on the attached list, Mar. 7, '19.)

E. S. SHERMERHORN.

You are requested to submit to this office, at the earliest practicable date, a list of all Indians of one-half or less Indian blood, who are able-bodied and mentally competent, twenty-one years of age or over, together with a description of the land allotted to said Indians, and the number of the allotment. It is intended to issue patents in fee simple to such Indians. Advise the office at once the approximate date when this list can be furnished.

Sincerely yours,

CATO SELLS,
Commissioner.

Approved:

FRANKLIN K. LANE,
Secretary.

5-1102

Refer in reply
to the following:

DEPARTMENT OF THE INTERIOR
Office of Indian Affairs
Washington.

March 7, 1919.

You are requested to submit to this office, at the earliest practicable date, a list of all Indians of one-half or less Indian blood, who are able-bodied and mentally competent, twenty-one years of age or over, together with a description of the land allotted to said Indians, and the number of the allotment. It is intended to issue patents in fee simple to such Indians. Advise the office at once the approximate date when this list can be furnished.

Sincerely yours,
CATO SELLS,
Commissioner.

Approved:
FRANKLIN K. LANE,
Secretary.

DEPARTMENT OF THE INTERIOR
Washington.

February First,
1919.

Hon Franklin K. Lane,
Secretary of the Interior,
Washington, D. C.
Dear Sir:

Complying with your request for a plan for expediting the issuance of patents in fee to competent Indians, I

have studied the situation and talked with many members of the office of the Commissioner of Indian Affairs. Aside from advising an increase in the number of competency commissions, few of those I interviewed had anything of value to offer in the way of suggestions.

After going into the matter as thoroughly as my limited investigation would permit, I have several suggestions to make which I believe will assist the Government in ridding itself of the responsibility of acting as guardian for the Indians, at least in a great measure.

At the present time there are but two competency commissions in the field and until recently there was never more than one at work. Of these two, one has not been engaged in work for the past thirty days or more, a member, Major McLaughlin, having been in Washington for that time. I am told that there are approximately 330,000 Indians in the nation and of these but 19,000 odd have been given their patents in fee. At the present rate of progress it would be many years before the work of issuing patents is finished.

Under the law, the Secretary of the Interior has the power to issue patents and the speed with which he can do this is limited to the number of recommendations filed with him by the competency commissions, unless, of course, legislation is resorted to in making possible the wholesale issuance of patents. Such legislation would not be advisable as it would be manifestly unfair to the Indian to declare him competent without first having determined that he was so.

In order to carry on this work more rapidly, I suggest that the number of men engaged in examining Indians with regard to their competency be increased. The present competency commission is composed of three men. These commissions can be cut to two men or even one, as the Secretary of the Interior elects.

I suggest that each agency superintendent be instructed to immediately begin an examination of the Indians in his charge for the purpose of determining their competency. His report bearing recommendations may be filed separately from that of the commissioner or commission. His work need in no wise conflict with that done by a commission or commissioner but will act as a check on the recommendations of the commission or commissioner. If there developed a difference of opinion between the agency suprintendent and the commission or commissioner, then a third agent could be sent out to examine into the particular case in question.

Of all persons in the service, the agency superintendent should be best equipped to determine the competency of an Indian. He has his subjects under almost daily observation. While it is a fact that some of the Indians live miles from the agency headquarters, there is nothing to prevent the superintendent going to that Indian and investigating his competency. The superintendent should be required to render a certain number of recommendations each month and a minimum number that he shall file should be fixed by the Secretary of the Interior.

Under the above system you have either two or three men passing upon the competency of the Indians and if your superintendent's report are filed separately and confidently they can act as a deciding vote when a difference of opinion occurs. Personally I think that the judgment of two good men is as good as that of three. By cutting your competency commissions to one-man commissions and putting about ten men in the field, in addition to the superintendents working at the same time, rapid progress would be made.

Some objection will naturally be made to the too rapid issuance of patents. It will be held that from eighty to ninety per cent of those Indians securing patents will sell their lands and many of them, being unable or not desiring to work, will become public cares. The answer to that argument is that it is simply a question of how soon the Indian is to become a public charge, if at all. Eventually all competent Indians will have patents issued to them.

If the Secretary of the Interior has absolute faith in an agency superintendent, he may accept as final his recommendations in an Indian competency case. In many instances the report of a superintendent, if he is honest and able, will be as good as a report filed by three men working together and more or less absorbing each other's views. In an agency of 3,000 Indians there would probably not be over 800 to 900 adult Indians. Wherefore it should not take a superintendent any great length of time

to complete his competency investigations and file his recommendations. The superintendent already has a fund of information regarding his subjects and this information will enable him to more quickly come to a determination regarding his recommendations. With every superintendent working on this matter, in addition to ten commissioners or agents, there should be a steady flow of recommendations filing into the office of the Secretary of the Interior.

The competency commissions or commissioners may either divide the work with the agency superintendents or may work independently of them, except so far as to secure from the superintendents such information as is necessary for them to proceed with dispatch on their work. The superintendents should be ready to direct the commissions or commissioners to those Indians he thinks most competent, so that much time now wasted on palpably incompetent Indians may be saved. After those apparently competent are disposed of, the commissions or commissioners may put in their time on the Indians left so that no competent Indian escapes securing his patent in fee.

By having one-man commissions the work now being done can be tripled and with the superintendents also working, quadrupled, if no more men are employed than at present.

Another phase of the work that needs expediting is the handling of inherited lands cases. Much delay is at pres-

ent caused by the slowness in determining the legal heirs to an estate. This is due, in a measure, to the fact that many of the eighteen or twenty examiners who were on the work, went to war. Many of these are now returning and the work will soon get back to normal. It is absolutely essential that the patents be issued immediately following the determination of the legal heirs, so that deaths, etc., may not cause a multiplication of heirs and thus cause the work to be done over again.

I can see no necessity for the competency commissions and agency superintendents working together on one commission. The superintendent has many other duties which absorb a large part of his time. Members of commissions are thus compelled to delay their work, in some instances, while waiting for the convenience of the superintendent. The same results may be obtained by these men working separately and independently.

When the Secretary of the Interior is not satisfied with the findings of the various agents, he may cause a commission of any fixed number of agents to sit and take testimony, thus arriving at a general recommendation which will in all probability be a correct one.

The five civilized tribes, located all in Oklahoma, comprise one-third of the Indians in the United States. Through this fact much time of traveling about by the examining agents is done away with and thus time is saved.

One of the members of the office of Indian Affairs believes that the Declaration of Policy should be amended

to read "all Indians of one-half blood or less," instead of "all Indians of less than one-half blood." This he suggests, on the theory that the United States owes little protection to the half-blood. If this suggestion were adopted, the Government would be getting rid of a much larger number of Indians than it is now possible to dispose of. There are many half-bloods who are perfectly capable of handling their own affairs.

It is also suggested that when a trust period is to be extended, that it be extended for not more than one year, instead of ten years as has been the custom. This would prevent a loss of taxes for any great period when an Indian is declared competent before the expiration of his trust period, in view of a Federal Court decision to the effect that an Indian is not obliged to pay taxes until the end of his trust period, regardless of whether he is issued a patent in fee.

I believe that five commissions of two members or ten individuals doing the work now being done by the commissions together with the superintendents working also, can clean up the competency examination within two years at least. It will be necessary, however, for the Department of the Interior to demand of the men so engaged that they work religiously and rapidly and waste no time.

When the competency work is done, if there is still any work to be done on the inherited lands cases, the whole force could be thrown into that work and rapidly clean it up.

If there is anything further that you desire investigated or further suggestions you want made, please advise me.

Respectfully,

W. A. MUNDELL.

January Fourteenth
1919

Mr. J. J. Cotter,
Department of the Interior,
Washington, D. C.
Dear Sir:

In connection with progress of competency among the Indians of America, exclusive of the five civilized tribes, I have obtained figures which show the number declared competent from 1907 to 1919 inclusive. A summary of patents in fee issued under Act of May 8, 1906, practically shows the number of Indians declared competent and is as follows:

1907	889
1908	1,987
1909	1,166
1910	355
1911	1,011
1912	344
1913	520
1914	1,148
1915	940

1916	934
1917	2,203
1918	4,378

The following statement is made by an attache of the office of the Commissioner of Indian affairs:

"The effectiveness of the Declaration of Policy promulgated April 17, 1917, is apparent from the number of fee patents that have been issued during the calendar year. There have been issued 4,403 fee patents, involving an area of 706,404 acres, representing an approximate value of $14,128,080. The total number of fee patents issued during the eleven years preceding 1918 was 12,097 involving an area of 1,380,316 acres. It will therefore be seen that during the fiscal year 1918 fee patents issued are about one-third of the total patents issued during the eleven years preceding and the area patented is more than one-half the area patented for those eleven years.

"During the fiscal year ending June 30, 1918, 662 pieces of allotted land covering 74,126.24 acres were sold for $1,541,177.95 under the provisions of the non-competent act. There were 438 pieces covering 49,216.19 acres sold for $1,174,854.97 under the inherited act. The average price received from both alloted and inherited Indian land is $22 per acre. This is the largest average price that has ever been received from the sale of Indian land."

I find that there is no system in vogue which governs the workings of the Competency Commissions. No rule is followed in selecting the tribe or district to be visited,

except that it has been the custom for the Competency Commissions to examine first those Indians whose trust patents are about to expire. The commissions then either recommend the issuance of a patent in fee and the Indian is declared competent or the period of trust is extended.

The Competency Commission began work in 1915, some of the work done by them is now being done over, so that more satisfactory results may be obtained. The general rule is that the competent Indian does not want a patent in fee nor to be declared competent, for he then has to bear his share of the burden of taxes.

The greatest number of Indians have been declared competent since 1916 and this is due in a great measure to the Declaration of Policy. (copy attached.)

The office of the Commissioner of Indian Affairs claims to have been hampered in its work of examining Indians regarding their competency because of the limited number of men it has been able to assign to this work.

Attention is directed to Page 197 of the Annual Report of the Commissioner of Indian Affairs,

Respectfully,

W. A. MUNDELL.

Dear Mundell:

Can you by a little study outline a definite and practicable program for this work—so that it will carry on faster.

F. K. L.

Circular No.

Order No.

INDIAN SCHOOL SUPERINTENDENTS.

(Corrected to May 1, 1917)

22.—Coeur d'Alene.

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs.

Washington, September 5, 1922.

I, E. B. Meritt, Assistant, Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

(Seal) E. B. MERITT,

Assistant Commissioner.

Circular No. 1649

DEPARTMENT OF THE INTERIOR.
Office Commissioner of Indian Affairs
Washington.

Relative competency
of Indians applying
for patents in fee.

November 23, 1920

TO ALL SUPERINTENDENTS:

Before the issuance of fee patents to Indians the question of competency must be carefully considered in each case and full report submitted, showing ability to manage their own affairs as well as the average white man, regardless of blood status.

This rule will apply to cases heretofore reported and not passed upon by the Department.

Sincerely yours,

(Signed) CATO SELLS,
Commissioner.

Approved: Nov. 30, 1920.
(Signed) PAYNE,
Secretary.

DEPARTMENT OF THE INTERIOR.
Office of Indian Affairs
Washington.

April 17, 1917.

DECLARATION OF POLICY
in the
ADMINISTRATION OF INDIAN AFFAIRS.

During the past four years the efforts of the administration of Indian affairs have been largely concentrated on the following fundamental activities—the betterment of health conditions of Indians, the suppression of the liquor traffic among them, the improvement of their industrial conditions, the further development of vocational training in their schools, and the protection of the Indians' property. Rapid progress has been made along all these lines, and the work thus reorganized and revitalized will go on with increased energy, with these activities and accomplishments well under way, we are now ready to take the next step in our administrative program.

The time has come for discontinuing guardianship of all competent Indians and giving each closer attention to the incompetent that they may more speedily achieve competency.

Broadly speaking, a policy of greater liberalism will henceforth prevail in Indian administration to the end that every Indian, as soon as he has been determined to

be as competent to transact his own business as the average white man, shall be given full control of his property and have all his lands and moneys turned over to him, after which he will no longer be a ward of the Government.

Pursuant to this policy, the following rules shall be observed:

1. *PATENTS IN FEE*: To all able-bodied adult Indians of less than one-half Indian blood, there will be given as far as may be under the law full and complete control of all their property. Patents in fee shall be issued to all adult Indians of one-half or more Indian blood who may, after careful investigation, be found competent, provided, that where deemed advisable patents in fee shall be withheld for not to exceed 40 acres as a home.

Indian students, when they are twenty-one years of age, or over, who complete the full course of instruction in the Government schoools, receive diplomas and have demonstrated competency will be so declared.

2. *SALE OF LANDS*: A liberal ruling will be adopted in the matter of passing upon applications for the sale of inherited Indian lands where the applicants retain other lands and the proceeds are to be used to improve the homesteads or for other equally good purposes. A more liberal ruling than has hitherto prevailed will hereafter be followed with regard to the applications of noncompetent Indians for the sale of their lands where they are old and feeble and need the proceeds for their support.

3. *CERTIFICATES OF COMPETENCY*: The rules which are made to apply in the granting of patents in fee and the sale of lands will be made equally applicable in the matter of issuing certificates of competency.

4. *INDIVIDUAL INDIAN MONEYS*: Indians will be given unrestricted control of all their individual Indian moneys upon issuance of patents in fee or certificates of competency. Strict limitations will not be placed upon the use of funds of the old, the indigent, and the invalid.

5. *PRO RATA SHARES—TRUST FUNDS*: As speedily as possible their pro rata shares in tribal trust or other funds shall be paid to all Indians who have been declared competent, unless the legal status of such funds prevents. Where practicable the pro rata shares of incompetent Indians will be withdrawn from the Treasury and placed in banks to their individual credit.

6. *ELIMINATION OF INELIGIBLE PUPILS FROM THE GOVERNMENT INDIAN SCHOOLS*: In many of our boarding schools Indian children are being educated at Government expense whose parents are amply able to pay for their education and have public school facilities at or near their homes. Such children shall not hereafter be enrolled in Government Indian Schools supported by gratuity appropriations, except on payment of actual per capita cost and transportation.

These rules are hereby made effective, and all Indian Bureau administrative officers at Washington and in the field will be governed accordingly.

This is a new and far reaching declaration of policy. It means the dawn of a new era in Indian administration. It means that the competent Indian will no longer be treated as half ward and half citizen. It means reduced appropriations by the Government and more self-respect and independence for the Indian. It means the ultimate absorption of the Indian race into the body politic of the Nation. It means, in short, the beginning of the end of the Indian problem.

In carrying out this policy, I cherish the hopes that all real friends of the Indian race will lend their aid and hearty cooperation.

CATO SELLS,
Commissioner.

Approved:
FRANKLIN K. LANE,
Secretary.

(Title of Court and Cause.)

CONSOLIDATED
Nos. 781 and 782.
DECISION
Sept. 16, 1922.

E. G. DAVIS, *U. S. Attoorney, for Complainant.*
ROBERT E. McFARLAND, *Prosecuting Attorney for Benewah County, and*
ROGER G. WEARNE, *Prosecuting Attorney for Kootenai County, Attorneys for Defendants.*
DIETRICH, *District Judge*:

In respect to the questions in issue these two cases are

identical, and they have been submitted upon the same general stipulation of facts. Each is brought upon behalf of a Coeur d'Alene Indian, to test the validity of claims for taxes levied by the state officers upon lands belonging to the Indian. And the fundamental question is whether, when the taxes were levied, the Government still held the title in trust for the benefit of the Indians, or such trusteeship had been terminated by valid fee patents. The lands were formerly a part of the Coeur d'Alene Indian Reservation and were allotted, in the one case to Maurice Antelope and in the other to Anasta Williams Smo, 178.80 acres to the former, and 160 acres to the latter. The provision under which the allotments were made is to be found in the appropriation act of June 21, 1906, (34 Stat. 325, 335), and is as follows:

"That as soon as the lands embraced within the Coeur d'Alene Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments to the same to be made to all persons belonging to or having tribal relations on said Coeur d'Alene Indian Reservation, to each man, woman, and child, 160 acres, and upon the approval of such allotments by the Secretary of the Interior, he shall cause patents to issue therefor under the provisions of the general allotment law of the United States."

In pursuance of the authority thus conferred upon the Secretary of the Interior, he caused the lands in question to be allotted to the Indians above named, and issued

"trust patents" to them on the 16th day of December, 1909. These trust patents contained the ordinary provisions of such instruments, one of which was a declaration that the Government would "hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust, for the sole use and benefit" of the grantee.

Recently prior to the passage of this act, namely, on May 8, 1906, the general allotment act of February 8, 1887, (24 Stat. 388), and particularly Section 6 thereof, had been amended, to read as follows:

"Sec. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States,

and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided,* That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further,* That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further,* That the provisions of this Act shall not extend to any Indians in the Indian Territory." (34 Stat. 182.)

When, therefore, in the Act of June 21, 1906, *supra,* authorizing the allotment of the Coeur d'Alene Reservation, the Secretary of the Interior was directed "to cause patents to issue under the provisions of the general allotment law of the United States," reference must have been intended to the Act of 1887, as amended by this Act of May 8, 1906, and accordingly the trust patents here involved were issued expressly "subject to all statutory

provisions and restrictions," including, of course, the provision of this last named act authorizing the Secretary, in his discretion, to adjudge an allottee competent and to issue to him patent in fee prior to the expiration of the twenty-five year period. Assuming to act under the authority of this provision, the Secretary, in 1916, (so it is stipulated), "duly and regularly declared" the two allottees "to be competent," and thereupon issued to them "patents in fee" for the lands in controversy, but they refused and still refuse to accept them. It is further stipulated that, pursuant to the statutes of Idaho, the lands were duly and regularly assessed for taxes for the years 1917 to 1920 inclusive, during which period neither the fee patents nor the order or judgment of the Secretary of the Interior adjudging the Indians competent had ever been revoked. It is further stipulated that on or about January 6, 1921, the Secretary of the Interior revoked the patents, but we are not advised of the circumstances of or reasons for such revocation. It is also stipulated that during the period the fee patents were outstanding, that is, from 1916 to 1921, "the Department of the Interior treated the said Maurice Antelope and Anasta Williams Smo as citizen Indians, and that the defendants (in levying taxes and taking proceedings to enforce the payment of the same) proceeded upon" the assumption that the Indians were competent and held title in fee simple to the lands. During this period the Indians did not alienate or attempt to alienate any of the lands, with the exception that Antelope sold to one of the de-

fendant counties, and executed to it a deed for a right of way for a public highway, for a consideration of $125.00. The other county defendant secured a right of way across the land of Smo by proceedings in eminent domain, in which Smo, as defendant, was treated as a competent party, and was paid $140.00 as compensation for the right of way.

It is not disputed that so long as the Government held the title in trust, the lands were exempt from taxation, and therefore, upon the facts as stipulated, there would seem to be but a single question left to decide:— Did the adjudication by the Secretary of the Indians' competency and the subsequent issuance of patent, with tender thereof to the Indians, operate to convey the legal title, or at least to relieve the Government of its trust? The mere fact that there has never been an actual physical delivery of the patents to the grantees is not of controlling importance, for it is familiar law that a patent may be effective without actual delivery. United States v. Schurz, 102 U. S. 378. United States v. Laam, 149 Fed. 581.

With much apparent confidence the Government relies upon Morrow v. United States, 243 Fed. 854, but upon analysis of the record here it will be seen that the case has little, if any, application. In substance it is there held that a trust patent, together with the provisions of pertinent statutes in force at the time the patent is issued, constitutes a contract between the Indian and the Government, and vests in the former rights of which he can

not be divested without his consent, and that therefore it was incompetent for Congress to change the property status established by the trust patent and the provisions of existing statutory law, over the objection of the Indian patentee. The act involved in that case, by which it was attempted to shorten the trust period, and hence to deprive the Indian of the valuable right of having his property exempt from taxation, was passed after the issuance of the trust patent. Here, as we have seen, the trust patents were issued by the Secretary of the Interior in pursuance of an act providing that they should issue "under the provisions of the general allotment law of the United States," and at the time of such authorization, and thereafter when the allotments were made and the trust patents were issued, the general allotment law of the United States expressly vested in the Secretary of the Interior the discretion, and he was authorized, whenever he was satisfied that an allottee was competent and capable of managing his own affairs, to cause to be issued to him a patent in fee simple. And there was the further provision that after the issuance of such fee patent "all restrictions as to sale, incumbrance, or taxation" of the land was removed. If, therefore, we apply the doctrine of the Morrow case, we must read into the trust patents here involved these provisions of law, by which apparently the Secretary of the Interior was authorized in his discretion to shorten the trust period, and by accepting the trust patents the patentees assented to the exercise of such authority as is thus conferred upon the Secretary.

The other contention of the Government is that the power of the Secretary of the Interior to adjudge an Indian competent in any specific case and to issue to him a patent, is conditioned upon the consent of such Indian and the acceptance by him of the patent. But in this view I am unable to concur. In considering the question it will be borne in mind that there is no suggestion of fraud or mistake on the part of the Secretary of the Interior, or of irregularity in the proceedings leading up to the issuance of the patent, and the question therefore is strictly one of the power of the Secretary under the amendatory act of May 8, 1906. It will be noted that the language of the act is "that the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple." Neither expressly nor inferentially does this language disclose an intent that the power thus conferred is confined to cases where the allottees make application or otherwise give their assent. Nor is it suggested either by the status of the Indians or the general and well-known policy of the Government in respect to them. They are wards, in a state of tutelage, and presumably are not competent always to choose what is for their good. Moreover, if, as has been the policy of the Government, the Indians are to be encouraged to adopt the institutions and conform to the habits of civilized life, it is important in their case, as in the case of white people, that they pos-

sess the power to impose upon all alike the burdens of maintaining such institutions. As in other communities, so civilized Indians must have roads and schools, and police protection, and these benefits cannot ordinarily be had without taxation. If in a community of capable Indians the majority desire thus to create for themselves the conditions of civilized life, they might very well be unable to proceed if an unprogressive minority has the power to withhold their lands from taxation. The Government, too, would thus be greatly hampered in carrying out its policies, and that these considerations were in the mind of the Secretary when these patents were issued is not open to doubt. The policy of emancipating capable Indians from guardianship and investing them with the rights and responsibilities of citizenship and giving them complete control of much of their property had long been in force. The Department maintained standing Competency Commissions, whose duty it was to go about and make investigation of the capacity and competency of individual Indians, upon the various reservations, and to report their conclusions with recommendation, in order that, when the facts warranted, the competency of such individuals might be adjudged without unnecessary delay and patents in fee simple issued, for the purpose of relieving the Government from the duties of guardianship, and imposing upon such competent Indians the responsibility of caring for themselves, and of putting it within the power of communities to tax local property, in carrying out the enterprises and maintaining the institutions

of civilized life. Such strength had this view obtained that early in the year 1917, but a few months after the issuance of the fee patents here in question, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, issued a formal "DECLARATION OF POLICY IN THE ADMINISTRATION OF INDIAN AFFAIRS," as of date April 17, 1917, from which we quote the first three paragraphs:

"During the past four years the efforts of the administration of Indian affairs have been largely concentrated on the following fundamental activities—the betterment of health conditions of Indians, the suppression of liquor traffic among them, the improvement of their industrial conditions, the further development of vocational training in their schools, and the protection of the Indians' property. Rapid progress has been made along all these lines, and the work thus reorganized and revitalized will go on with increased energy. With these activities and accomplishments well under way we are now ready to take the next step in our administrative program.

"*The time has come for discontinuing guardianship of our competent Indians and giving even closer attention to the incompetent, that they may more speedily achieve competency.*

"Broadly speaking, a policy of greater liberalism will henceforth prevail in Indian administration, to the end that every Indian, as soon as he has been determined to be as competent to transact his own business as the average white man, shall be given control of his property and

have all his lands and moneys turned over to him, after which he will no longer be a ward of the Government."

The Declaration ends with this paragraph:

"This is a new, far-reaching declaration of policy. It means the dawn of a new era in the Indian administration. It means that the competent Indian will no longer be treated as half ward and half citizen. It means reduced appropriations by the Government and more self-respect and independence for the Indian. It means the ultimate absorption of the Indian race into the body politic of the nation. It means, in short, the beginning of the end of the Indian problem."

Without going into detail, it is to be said that a perusal of departmental correspondence and documents leaves no doubt of the view of the Department that the Secretary had the authority, under the act of May 8, 1906, at any time, within his discretion, to declare the competency of an Indian and to issue to him a fee patent without his consent, or of the further view that such authority was indispensable to the successful execution of governmental policies touching the well-being and civilization of the Indians.

If then in the successful execution of well-known governmental policies toward the Indians, it is essential that the Secretary of the Interior be clothed with such authority, and the Act of May 8, 1906, seems expressly to confer it, and in the administration of Indian affairs the executive officers have for many years assumed that such was the legislative intent, upon what theory are we to adopt a

contrary view? Such power touching the property rights of Indian wards is not exceptional; it is rather the rule. By the original allotment act itself (24 Stat. 388), upon the refusal or failure of an adult Indian to select an allotment, the Secretary is authorized to make the selection for him (Sec. 2). So after lands are allotted the Secretary may, without the consent of the allottees, grant rights of way. Act May 3, 1901, 31 Stat. 1083. Act May 6, 1910, 36 Stat. 349. Act March 2, 1917, 39 Stat. 973. By the Act of January 26, 1895, as amended April 23, 1904, (28 Stat. 641, and 33 Stat. 297), the Secretary is authorized to correct mistakes in the issuance of trust patents by canceling the same. By Section 5 of the general allotment act, the President is authorized to extend the trust period beyond twenty-five years. It will hardly be suggested that before he can do this in any particular case he must have the consent of the Indian allottee. But is there not quite as much reason there as here for interpolating a provision requiring the Indian's consent? In case of the death of an Indian before final patent the Secretary may ascertain the heirs, and if he regards them as competent he "shall issue" to them patents in fee simple; but if they are incompetent the lands may be sold and the proceeds held in trust for them. Act May 29, 1908, 35 Stat. 444. Act June 25, 1910, 36 Stat. 855. Act May 18, 1916, 39 Stat. 127. By act of October 19, 1888, Section 2, (25 Stat. 612), one allotment may be exchanged for another, but the consent of the Indian interested is expressly required. Why not a similar requirement here if Congress so intended?

Upon a consideration of the whole case I have been unable to escape the conclusion that Congress intended to confer upon the Secretary of the Interior the unqualified authority, within his sound discretion, to declare an Indian allottee competent, and to issue to him a patent in fee, and that such power may be exercised without infringing any vested right of the Indian, because such was the law at the time the allotments here involved were made and the trust patents issued.

Whether the attempted revocation of the fee patents by the Secretary in 1921 was or was not effective we need not now decide; there is no suggestion in the record of the ground upon which the action was taken. By express stipulation, in the year 1916 the two Indian allottees were duly and regularly declared by the Secretary of the Interior to be competent, and thereupon the patents in fee issued. If, as we hold, the Secretary had the power to take such action without the consent of allottees, these two Indians had the status of citizens, and they were possessed of the complete title in fee simple to these lands during the entire period covered by the tax proceedings now assailed. It must therefore be held that under the provisions of the Act of May 8, 1906, the lands were subject to taxation and the taxes in question are valid. Accordingly the bill of complaint in each case will be dismissed with prejudice.

Endorsed. Filed Sept. 18, 1922.
W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause)

CONSOLIDATED CAUSES IN EQUITY
Nos. 781 and 782

AFFIDAVIT IN SUPPORT OF PETITION FOR INJUNCTION PENDING APPEAL.

United States of America,
District of Idaho. } ss.

McKeen F. Morrow, being first duly sworn, deposes and says: That he is a duly qualified, appointed and acting assistant United States Attorney for the District of Idaho, and as such is familiar with the facts in the above entitled consolidated causes; that said actions were brought for the purpose of enjoining and restraining the counties of Benewah and Kootenai, and the respective county commissioners and tax collectors of said counties, from taking steps to enforce the collection of delinquent taxes against the lands described in the Bills of Complaint herein, constituting the allotments of Anasta Williams Smo and Morris Antelope, Coeur d'Alene Indians, and to restrain said counties and the said officers from issuing tax deeds thereon; that the 1917 taxes on the lands described in said complaints were paid under protest, and the 1918, 1919 and 1920 taxes went delinquent, delinquency certificates being issued for the 1918 taxes,

and delinquency entries, pursuant to the law then in force, having been made for the 1919 and 1920 taxes;

That decrees were entered in said causes on the 27th day of November, 1922, and said counties, through their proper officers, have given notice, as provided by law, that unless payment of the delinquent 1919 taxes is made by or in behalf of the said Indians on or before the 5th day of January, 1923, the said tax collectors will issue to the respective counties tax deeds as provided by law, and affiant is informed and believes that steps will also be taken in the immediate future to foreclose the delinquency certificates issued for the 1918 taxes, and to cause the issuance of tax deeds therefor;

That an appeal is now being perfected by the United States to the United States Circuit Court of Appeals for the Ninth Circuit from the said decrees made and entered November 27, 1922, and such appeal is taken in good faith and for the purpose of determining the right of the defendant counties to tax the lands allotted to said Indians under the facts shown by the record herein; and in order to determine the effect of the issuance of fee simple patents to said Indians without their consent or acceptance, in lieu of the trust patents theretofore issued to said Indians; that approximately one hundred and sixty acres of land is involved in each of said consolidated causes, and the value of said lands is greatly in excess of the amount of the taxes, together with penalties and interest, levied against the same, and in the event that it should be finally held that the lands of such Indians are subject to

taxation by the defendant counties, the said Indians will be deprived of their right to redeem the said lands from such delinquent taxes unless the said counties and their respective officers shall be enjoined and restrained by this Honorable Court from enforcing the collection of the said taxes involved herein, and from taking any steps to foreclose such delinquency certificates or to sell said lands for taxes, or to issue tax deeds therefor, pending the determination of such appeal; that in order to preserve the subject matter of this litigation and to maintain the status quo of the parties, and in order to prevent great and irreparable injury to the said Indian wards of the United States, it is necessary that such temporary injunction issue, pending the determination of said appeal.

McKEEN F. MORROW,

Subscribed and sworn to before me this 27th day of December, A. D. 1922.

W. D. McREYNOLDS,
Clerk of the U. S. District Court.
(Seal) By PEARL E. ZANGER,
Deputy.

Endorsed. Filed Dec. 30, 1922.
W. D. McREYNOLDS,
Clerk.
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause)

CONSOLIDATED CAUSES IN EQUITY
Nos. 781 and 782
PETITION FOR APPEAL

The above named complaint conceived itself aggrieved by those certain decrees made and entered on the 27th day of November, 1922, in the above entitled consolidated cause, and by the decisions rendered therein on the 16th day of September, 1922, does hereby appeal from said decrees and said decision to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors filed herewith; and your petitioner prays that this appeal may be allowed, and that a transcript of the record proceedings and papers upon which said decree were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner desiring to stay the enforcement of said decrees of dismissal pending the decision of this appeal, and to preserve the subject matter of this litigation, and to protect Morris Antelope and Anasta Williams Smo, the Indians in whose behalf the above consolidated actions were brought, in their right to redeem the lands, described in the respective bills of complaint from the taxes levied by defendant counties in the event that said taxes are upheld, respectfully prays that with the allowance of this appeal the said defendants named in said bills of complaint, and each of them, and their successors in office, and any and all persons acting for or

in their behalf, may be restrained and enjoined from enforcing the collection of the said taxes referred to in the bills of complaint herein, and from taking any steps to foreclose delinquent certificates, or to sell said lands for taxes or to issue tax deeds therefor pending the determination of this appal.

The application for such stay order is based upon the records and files in this action and upon affidavits filed herein, hereby referred to and hereby made a part hereof.

E. G. DAVIS,
United States District Attorney.
McKEEN F. MORROW,
Assistant United States District Attorney.

Endorsed. Filed Dec. 30, 1922.
W. D. McREYNOLDS,
Clerk.
By PEARL E. ZANGER,
Deputy.

CONSOLIDATED CAUSES IN EQUITY
Nos. 781 and 782
ASSIGNMENT OF ERRORS.

And now comes the plaintiff, the United States of America, by the United States Attorney for the District of Idaho, and says that in the decrees made and entered in the above entitled consolidated causes on the 27th day of November, 1922, and in the decision filed therein on or about the 16th day of September, 1922, there is manifest error particularly in the following respects:

1. Because the Court erred in dismissing the bills of complaint with prejudice.

2. Because the Court erred in holding and deciding, in effect, that the trust patents issued to the Indians in question did not confer vested rights upon them to have the lands covered by their trust patents held in trust for a period of twenty-five years, and, at the end of that time, conveyed to them or their heirs, free from all charges and incumbrances whatsoever.

3. Because the Court erred in holding and deciding that said trust patents were issued to the said Indians subject to the right of the Secretary of the Interior under the Act of Congress of May 8th, 1906, in his discretion, and without the consent of such Indians, to adjudge them to be competent and to issue to them patents in fee simple the effect of which would be to render the lands taxable.

4. That the Court erred in holding and deciding that Congress had conferred upon the Secretary of the Interior the unqualified authority, within his discretion, to declare an Indian holding an allotment made after May 8th, 1906, competent and to issue him a patent in fee simple, the effect of which would be to render his lands taxable.

5. That the Court erred in holding and deciding that the Secretary of the Interior had the authority to adjudge Indian allottees competent and issue fee simple patents to them without their consent.

6. That the Court erred in holding and deciding that the fee simple patents issued to these Indians were of any force or effect prior to their acceptance by such Indians.

7. That the Court erred in failing to hold and decide that the provisions of the Act of May 8th, 1906, were nothing more than the extension of a benefit to the Indian in the nature of a privilege or election to have the trust period of his allotment curtailed, by the Secretary of the Interior, in the exercise of his discretion, and upon application by the Indian, after he had determined the Indian to be competent and capable of managing his affairs.

8. That the Court erred in holding and deciding that Congress had power to curtail the trust period of an Indian's allotment without his consent.

WHEREFORE, The said complainant prays that the decrees entered herein be reversed and set aside with directions to the said District Court to grant said injunctions as prayed for in the bills of complaint herein.

E. G. DAVIS,
United States District Attorney.
McKEEN F. MORROW,
Assistant United States District Attorney.
Solicitors for Complainant, Residence
Boise, Idaho.

Endorsed. Filed Dec. 30, 1922.
W. D. McREYNOLDS,
Clerk.
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause)

CONSOLIDATED CASES IN EQUITY

Nos. 781 and 782

ORDER ALLOWING APPEAL AND RESTRAINING DEFENDANTS PENDING APPEAL.

And now, to-wit: On the 30th day of December, 1922, it is ordered that the foregoing petition for appeal be granted and that said appeal be allowed as prayed for.

And the matter of restraining and enjoining the defendants hereinafter named as prayed for in said petition having come on regularly for hearing on this 30th day of December, 1922, on the records and files in this action including the assignment of errors and the petition for appeal herein and the affidavit of McKeen F. Morrow, and it appearing that the attorneys for the defendants have waived notice of such hearing and do not object to the granting of a stay order in the premises; now therefore it is hereby ordered that you, the said Benewah County, Idaho, and A. C. Wunderlick, C. A. Walker, W. R. Armstrong, and F. H. Trummel, and Kootenai County, Idaho, Hans Johnson, J. W. McCrea, Frank A. Morris and S. H. Smith, and each of you, and your and each of your agents, servants, employees, officers and attorneys, and the successors in office of each of you who are individual defendants and all persons acting by or under the authority or direction of you or either of you be and you are hereby restrained and enjoined from

issuing tax deeds for the years 1918, 1919 and 1920 upon the following described lands, to-wit:

Lots One (1), Two (2), Three (3) and Four (4), Section Twenty-four (24), Township Forty-five (45) North, Range Six (6) West, Boise Meridian, and

Northeast Quarter (NE¼) of Section Twenty (20), Township Forty-seven (47) North, Range Five (5) West Boise Meridian,

or to sell said lands or any portion thereof for said taxes pending the determination of this appeal and the filing of the Mandate thereon in the office of the Clerk of the United States District Court for the District of Idaho.

Dated: 30th day of December, 1922.

FRANK S. DIETRICH,
District Judge.

Endorsed. Filed Dec. 30, 1922.
W. D. McREYNOLDS,
Clerk.
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause)

CONSOLIDATED CAUSES IN EQUITY.

Nos. 781 and 782

PRAECIPE.

To W. D. McReynolds, Clerk of the above entitled Court:

You will please prepare the record upon the appeal of plaintiff in the above entitled consolidated cases from those certain decrees made and entered on the 27th day of November, 1922, such record to consist of the following:

1. Complaint in the case of United States vs. Kootenai County, et al.

2. Answer in the case of United States vs. Kootenai County, et al.

3. Complaint in the case of United States vs. Benewah County, et al.

4. Answer in the case of United States vs. Benewah County, et al.

5. Orders consolidating cases.

6. Stipulation of parties as to record on appeal, including the following, by reference:

(a). Stipulation of facts, filed May 22, 1922.

(b). Supplemental stipulation of facts, filed September 15, 1922.

(c). Certified copy of declaration of policy, dated April 17, 1917.

(d). Certified copy of departmental correspondence, omitting the last page thereof, except the following: "22. Coeur d'Alene."

7. Decision of the Court.

8. Decree in United States vs. Kootenai County, et al.

9. Decree in United States vs. Benewah County, et al.

10. All papers filed in connection with this appeal, to-wit:

Assignment of errors.

Petition for appeal.

Affidavit of McKeen F. Morrow in support of petition for injunction pending appeal.

Order allowing appeal and restraining defendants pending appeal.

Citation.

This praecipe.

In preparing the above record, you will please omit the title of all pleadings except the title of the two complaints of plaintiff, and in lieu thereof, insert the words: "Title of Court and Cause," to be followed by the name of the pleading or instrument. You will also omit the verification of all pleadings, but in lieu thereof, insert, wherever the pleading is verified, the words: "Duly verified."

Dated this 3rd day of January, 1923.

E. G. DAVIS,
United States Attorney.
McKEEN F. MORROW,
Assistant United States Attorney.
Solicitors for Plaintiff.

Affidavit of service attached.
Endorsed. Filed Jan. 4, 1923.
W. D. McREYNOLDS,
Clerk.
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause)

CONSOLIDATED CAUSES IN EQUITY

Nos. 781 and 782

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED, by and between the parties to the above entitled consolidated cases, through their respective attorneys, that the following constitutes all the evidence submitted to or considered by the District Court in rendering its decision herein, to-wit:

1. Stipulation of facts, filed May 22, 1922;

2. Supplemental stipulation of facts, filed September 15, 1922;

3. Certified copy of declaration of policy, dated April 17, 1917, and certified under date of September 5, 1922;

4. Certified copy of departmental correspondence in relations to declarations of competency and issuance of fee patents to Indians, certificate bearing date September 6, 1922.

IT IS FURTHER STIPULATED AND AGREED that the papers above referred to and included in this stipulation may be taken and considered by the Appellate Court in lieu of a statement of the evidence, and that the same shall be printed in full, except that the Indian Agencies on the last page of the certified copy of the departmental correspondence may be omitted except the following portion: "No. 22. Coeur d'Alene."

Dated this 5th day of January, 1923.

E. G. DAVIS,
United States Attorney.

McKEEN F. MORROW,
Assistant United States Attorney.
Solicitors for Plaintiff.

ROGER G. WEARNE,
Solicitor for Kootenai County, et al.

ROBERT E. McFARLAND,
Solicitor for Benewah County, et al.

The foregoing papers were considered by me in the trial of the case and the above stipulation is approved this 26th day of January, 1922.

FRANK S. DIETRICH,
District Judge.

Endorsed. Filed Jan. 26, 1923.
W. D. McREYNOLDS,
Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.

UNITED STATES OF AMERICA, *Complainant,* vs. BENEWAH COUNTY, IDAHO, A. C. WUNDERLICK, C. A. WALKER, W. R. ARMSTRONG, and F. H. TRUMMEL, *Defendants.*	In Equity No. 781
UNITED STATES OF AMERICA, *Complainant,* vs. KOOTENAI COUNTY, IDAHO, HANS JOHNSON, J. W. McCREA, FRANK A. MORRIS and S. H. SMITH, *Defendants.*	In Equity No. 782

CITATION

CONSOLIDATED

United States of America)ss:

To:

Benewah County, Idaho, A. C. Wunderlick, C. A. Walker, W. R. Armstrong, and F. H. Trummel, and Kootenai County, Idaho, Hans Johnson, J. W. McCrea, Frank A. Morris and S. H. Smith.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in

the State of California, within twenty days from the date of this writ pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein the United States of America is complainant and you and each of you are defendants, to show cause, if any there be, why the decrees in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Frank S. Dietrich, United States District Judge for the District of Idaho, this 30th day of December, A. D., 1922, and the Independence of the United States the One Hundred and Forty seventh.

FRANK S. DIETRICH,

(Seal) *District Judge.*

W. D. McREYNOLDS,

Clerk.

Service of the foregoing citation and receipt of a copy thereof acknowledged this 5th day of January, 1923.

ROGER G. WEARNE,

Attorneys for Kootenai County, et al.

Service of the foregoing citation and receipt of a copy thereof acknowledged this 5th day of January, 1923.

ROBT. E. McFARLAND,

Attorneys for Benewah County, et al.

Endorsed. Filed Jan. 16, 1923.

W. D. McREYNOLDS,

Clerk.

By PEARL E. ZANGER,

Deputy.

CLERK'S CERTIFICATE

I. W. D. McReynolds, Clerk of the District Court ofthe United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 89, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $126.55, and that the same has been paid by the appellant.

Witness my hand and the seal of said court this 15th day of February, 1923.

W. D. McREYNOLDS,

(Seal) *Clerk.*

No. 3985

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED CAUSES

UNITED STATES OF AMERICA,

Appellant,

vs.

BENEWAH COUNTY, IDAHO, A. C. WUNDERLICK, C. A. WALKER, W. R. ARMSTRONG, and F. H. TRUMMEL,

and

KOOTENAI COUNTY, IDAHO; HANS JOHNSON, J. W. McCREA, FRANK A. MORRIS and S. H. SMITH,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

FILED
APR 20 1931

E. G. DAVIS,
United States Attorney,

McKEEN F. MORROW,
Assistant United States Attorney,
Residence, Boise, Idaho,
Solicitors for Appellant.

KENNARD-ANDERSON PRESS

No. 3985

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED CAUSES

UNITED STATES OF AMERICA

Appellant,

vs.

BENEWAH COUNTY, IDAHO, A. C. WUNDERLICK, C. A. WALKER, W. R. ARMSTRONG, and F. H. TRUMMEL,

and

KOOTENAI COUNTY, IDAHO, HANS JOHNSON, J. W. McCREA, FRANK A. MORRIS and S. H. SMITH,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

E. G. DAVIS,
United States Attorney,

McKEEN F. MORROW,
Assistant United States Attorney,
Residence, Boise, Idaho,
Solicitors for Appellant.

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED CAUSES

UNITED STATES OF AMERICA

Appellant,

vs.

BENEWAH COUNTY, IDAHO, A. C. WUNDERLICK, C. A. WALKER, W. R. ARMSTRONG, and F. H. TRUMMEL,

and

KOOTENAI COUNTY, IDAHO, HANS JOHNSON, J. W. McCREA, FRANK A. MORRIS and S. H. SMITH,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

STATEMENT OF THE CASE.

The Bills of Complaint in each of the above cases were filed by the United States on behalf of a Coeur d'Alene Indian in order to test the validity of taxes levied for State and County purposes by defendants against the lands of the Indians. As the same questions of law and fact were presented in each case, they were consolidated by order of the court (Tr. pp. 18, 35). The consolidated cases were heard upon the Bills and Answers, two stipu-

lations as to the facts (Tr. pp. 37, 43) and certified copies of certain declarations and correspondence of the office of Indian Affairs in the Department of the Interior (Tr. pp. 44-61). Upon final hearing, the learned District Judge entered a decree in each case dismissing the Bills of Complaint with prejudice, (Tr. pp. 19, 36) for the reasons set forth in his written decision (Tr. pp. 61-73).

The lands in question were formerly a part of the Coeur d'Alene Indian Reservation established by Executive Orders of June 14, 1867, and November 8, 1872, for the Coeur d'Alene Indians. These Indians were formerly possessed of a large and valuable tract of land lying in the territories of Washington, Idaho and Montana, which they ceded to the United States in accordance with treaties of March 26, 1887, and September 9, 1889, and these treaties were ratified by an Act of Congress approved March 3, 1891, (26 Stat. 981, 1026-1032).

On December 16, 1909, Trust Patents were issued to the Indians in question, Morris Antelope and Anasta Williams Smo, for the lands described in the Bills of Complaint (Tr. p. 42). The granting words of these Patents were as follows:

> "NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said,
> the land above described, and hereby declares that it does and will hold the land thus allotted (subject

to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free from all charge and incumbrance whatsoever, if said Indian does not die before the expiration of the said trust period." (Tr. pp. 42, 43).

These trust patents were issued pursuant to the provisions of the Act of June 21, 1906, (34 Stat. 325-335) and the General Allotment Act of February 8, 1887, (24 Stat. 388). In the year 1916, the Secretary of the Interior duly and regularly declared Antelope and Smo to be competent Indians and issued to them patents in fee, pursuant to the Burke Act of May 8, 1906 (34 Stat. 182), amending section six of the General Allotment Act of Feb. 8, 1887. This was done without any application on the part of the two Indians, and when notified, they refused to accept the patents and the same were held for delivery from that time until January 6, 1921, when they were revoked and cancelled by the Secretary of the Interior (Tr. p. 39).

During this period taxes were levied by Benewah and Kootenai Counties against these lands. The 1917 taxes, amounting to $272.81 in the case of Antelope, and $325.62 in the case of Smo, were paid under protest, while the taxes for the years 1918, 1919 and 1920, amounting to $1264.81 against the lands of Morris Antelope and to

$810.20 against the lands of Anasta Williams Smo, went delinquent, and delinquency certificates issued therefor in accordance with the laws of the State of Idaho, but collection of the same has been enjoined in these cases (Tr. p. 39). No taxes were levied for the year 1921, but at least one of the Counties has taxed the land for the year 1922, relying apparently upon the suggestion made by the court below in the last paragraph of its opinion, that the cancellation of the patent by the Secretary of the Interior might be ineffectual (Tr. p. 73).

The stipulations of fact further show, that no attempt has been made by the Indians to alienate their lands since they were declared competent except in regard to a right of way for road purposes and that from 1916 to 1921, the Department of the Interior treated the Indians as citizen Indians, and the defendants proceeded upon said assumption.

Upon this state of facts, the broad general question is presented, whether or not these lands were subject to taxation by the State authorities for the years 1918, 1919 and 1920.

ASSIGNMENT OF ERRORS.

The errors assigned by Appellant are set forth at pages seventy-nine and eighty of the Transcript, and may be summarized as follows:

1. That the court erred in holding and deciding in effect that the trust patents issued to the Indians in question did not confer vested rights upon them to have

the lands covered by their trust patents conveyed to them or their heirs at the end of the twenty-five year trust period free from all charges and incumbrances including taxes levied by the State authorities.

2. That the construction placed by the court upon the Act of Congress of May 5, 1906, (34 Stat. 182) was erroneous and that Act did not confer upon the Secretary of the Interior an unqualified authority in his discretion to declare an Indian competent and issue to him a patent in fee, but that Act merely extended to the Indian a privilege or election to have the trust period specified in the patent for his allotment curtailed upon his application provided the Secretary of the Interior in the exercise of his discretion determined the Indian to be competent and capable of managing his own affairs.

3. That the court erred in holding and deciding that the fee simple patents issued to these Indians rendered their lands subject to taxation prior to their acceptance by such Indians, or were of any force or effect prior to that time.

4. That the court erred in holding and deciding that the Secretary of the Interior had the unqualified authority to adjudge Indian allottees competent and issue fee simple patents to them without their consent, the effect of which would be to render their lands taxable.

BRIEF OF THE ARGUMENT.

The property of the Coeur d'Alene Indians could not be taken from them without their consent.

Organic Act of the Territory of Idaho, Act of March 3, 1863 (12 Stat. 808).

Idaho Admission Bill, Act of June 3, 1890 (Public 199).

Treaty with Coeur d'Alene Indians March 26, 1887.

Act of March 3, 1891 (26 Stat. 989, 1026-1032).

Statutes and treaties relating to property and rights of Indians are given a liberal construction by the court in favor of the Indians.

Choate vs. Trapp 224 U. S. 665, 56 L. Ed. 941.

Kansas Indians 5 Wall. 737, 760.

Jones vs. Meehan 175 U. S. 1.

Morrow vs. United States 243 Fed. 654.

Chase vs. United States 222 Fed. 593.

The agreement on the part of the United States to hold the land included in the trust patents issued in 1909, free from all charges and incumbrances for the period of twenty-five years, created vested property rights in the Indians, Antelope and Smo to have the land held free from taxation during that period.

Act of June 21, 1906 (34 Stat. 325, 335).

General Allotment Act of February 8, 1887 (24 Stat. 388, 391, Sec. 5).

Morrow vs. United States 243 Fed. 854 (C. C. A. 8th Circuit).

Choate vs. Trapp 224 U. S. 665, 56 L. Ed. 941.

Gleason vs. Wood 224 U. S. 679, 56 L. Ed. 947.

English vs. Richardson 224 U. S. 680, 56 L. Ed. 949.

Ward vs. Love County 253 U. S. 17, 64 L. Ed. 751.

Williams vs. Johnson 239 U. S. 414, 421, 60 L. Ed. 358.

The Secretary of the Interior had no power under the Burke Act of May 8, 1906, to declare an Indian competent and issue a fee patent to him without an application by the Indian or his subsequent consent and acceptance of such patent.

Act of May 8, 1906 (34 Stat. 182).

Report of Committee on Indian Affairs (No. 1998, 59th Congress).

Choate vs. Trapp 224 U. S. 665, 56 L. Ed. 941.

Morrow vs. United States 243 Fed. 854.

Irwin vs. Wright 258 U. S. 219, 66 L. Ed.....

Fee simple patents issued to Indian allottees without previous application by them must be accepted by the Indians in order to become effective, and the rule as to the necessity of delivery of an ordinary public land patent does not apply in such cases.

United States ex rel. Prettybull vs. Lane, 47 App. D. C. 134.

Northern Pacific Railway Company vs. United States, 227 U. S. 355.

La Roque vs. United States 239 U S. 62.

Ash Sheep Company vs. United States, 252 U. S. 159.

ARGUMENT.

The substantial question involved in these cases is the right of the State authorities to tax the lands of the Indians, Morris Antelope and Anasta Williams Smo, under the facts outlined in the above statement, and in order to determine this matter we must first consider the pertinent provisions of the treaties with the Indians and the Acts of Congress bearing upon the question.

The Organic Act of the Territory of Idaho approved March 3, 1863, (12 Stat. 808) provides in part as follows:

> "PROVIDED FURTHER, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such right shall remain inextinguished by treaty between the United States and such Indians, or include any territory, which, by treaty with the Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Idaho, until said tribe shall signify their assent to the President of the United States to be included within said Territory, or to affect the authority of the Government of the United States, to make any regulations respecting such Indians,

> their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the Government to make if this Act had never been passed."

There is nothing in the Idaho Admission Bill approved July 3, 1890 (Public 199) or in the Constitution of the State of Idaho ratified by that Act, which in any way modifies or affects the above provisions.

Article 5 of the treaty with the Coeur d'Alene Indians made March 26, 1887, which was approved and ratified by the Act of Congress March 3, 1891, (26 Stat. 989, 1026-1032) provides in part as follows: "In consideration of the foregoing cessions and agreements it is agreed that the Coeur d'Alene Indian Reservation shall be held forever for Indian land and as homes for the Coeur d'Alene Indians * * * and no part of said Reservation shall ever be sold, occupied, open to white settlement, *or otherwise disposed of without the consent of the Indians residing on said Reservation.* (Our italics).

The Indian Appropriation Act of June 21, 1906, (34 Stat. 325, 335,) provided for allotments in severalty on this Reservation in the following language:

> "That as soon as the lands embraced within the Coeur d'Alene Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Coeur d'Alene Indian Reservation, to each man, woman,

and child one hundred and sixty acres, and, upon the approval of such allotments by the Secretary of the Interior he shall cause patents to issue therefor under the provisions of the general allotment law of the United States."

The general allotment law was the Act approved February 8, 1887, (24 Stat. 388-391), Section 5 of which provided in part as follows:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, *and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.*" (Our italics).

Section 6 of the General Allotment Act as originally enacted provided for the granting of citizenship to certain Indians, but this section was amended by the act approved May 8, 1906, (34 Stat. 182) providing that upon

the issuance of fee patents to Indians they should become subject to all laws of the State or Territory in which they resided, and containing, also, the following proviso:

> "*Provided,* That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further,* That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *and provided further,* That the provisions of this Act shall not extend to any Indians in the Indian Territory."

It may be noted that at the time the Act of June 21, 1906, was introduced in Congress, the amendment had not been made, but apparently it had already been introduced, and it was passed and approved by the President prior to the statute providing for allotments to the Coeur d'Alene Indians.

The decision of the learned District Judge is based in the main upon three propositions, first, that the issuance

of the fee patents, followed by tender thereof to the Indians conveyed the legal title and relieved the Government of its trust without the actual physical delivery of the patents, following the established doctrine that a patent to public lands is effective upon its issuance and without actual delivery to the patentee; second, that the Indians had no vested right to hold their allotments free from taxation for twenty-five years because the trust patents were by their terms issued "subject to all statutory provisions and restrictions" and this reservation included the right of the Secretary under the Act of May 8, 1906, to declare the Indians competent and issue fee patents to them which would make their lands taxable; third, Congress by the Act of May 21, 1906, conferred upon the Secretary of the Interior the unqualified authority within his sound discretion to declare an Indian competent and issue to him a fee patent without the consent of such Indian or his acceptance of the patent.

The United States as Trustee for Indian wards throughout the country owes a duty to such wards to protect and safe-guard their rights, and feeling as we do, that each of the propositions relied upon by the learned trial court is incorrect and erroneous as applied to the facts of these cases, we respectfully submit that the true rules of law applicable here are as follows:

1. Under the treaties, the Acts of Congress relating to the Coeur d'Alene allotments and the trust patents, Morris Antelope and Anasta Williams Smo, each had a

vested right to hold their land for the full trust period of twenty-five years free from taxation.

2. The Act of May 8, 1906, merely conferred upon Indian allottees a privilege or election to have the trust period specified in the patent for their allotments curtailed upon their application provided the Secretary of the Interior in the exercise of his discretion should determine the particular Indian to be competent and capable of managing his own affairs.

3. The ordinary rule as to the effect of issuing a patent without delivery in public land cases does not apply where the Secretary of the Interior determines an Indian allottee competent and issues to him a fee patent without previous application therefor, and in the absence of such previous application the fee patent is inoperative and ineffectual until the Indian accepts the patent, and in the event of his refusal to accept the patent, the Secretary of the Interior retains jurisdiction and authority to cancel and revoke the patent with the Indian's consent.

TRUST PATENTS CONVEYED VESTED RIGHTS.

We have seen that section 5 of the Coeur d'Alene treaty of March 26, 1887, provided that "no part of said Reservation shall ever be sold, occupied, open to white settlement, *or otherwise disposed of without the consent of the Indians residing on said Reservation;*" that section 5 of the General Allotment law of 1887 provided for the issuance of trust patents which should declare "*that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as*

aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever;" and that the trust patents issued in these cases contained the following language in the granting portion:

> "NOW KNOW YE, That the UNITED STATES OF AMERICA, * * * hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, *and at the expiration of the said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free from all charge and incumbrance whatsoever,* if said Indian does not die before the expiration of the said trust period." (Tr. pp. 42, 43).

It will be noted that section 5 of the Allotment Act and the patent contained two separate clauses, first, a declaration that the land will be held in trust for twenty-five years and, second, that at the end of that period the United States will convey the land free of all charges and incumbrances. In the patent itself, the words "subject to all statutory provisions and restrictions" are inserted by way of parenthesis in the first of these clauses, and the learned District Judge construed this qualification to mean, that the provision of the second clause as well as the first was subject to the right and power of the Secretary of the Interior, whenever he should con-

sider a particular Indian to be competent to terminate the trust period without any application or consent on the part of the Indian and to issue to him a patent in fee which would be in full force and effect from the time it had been signed, countersigned, sealed, and recorded in the register of patents in the General Land Office at Washington.

This construction seems to us to leave out of consideration the positive statement in the treaty that the lands of the Reservation shall never be disposed of without the consent of the Indians residing on said Reservation, and it seems, further, to construe the provisions of the patent, the statutes and the treaty most strongly against the Indian when as a matter of fact it is thoroughly established that in connection with Indian matters the rule of construction should be exactly the opposite.

Thus, in the case of Choate vs. Trapp 224 United States 665 at page 675, 56 L. Ed. 941, the court states:

> "But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; *doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.* This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.
>
> "For example, in *Kansas Indians,* 5 Wall. 737,

760, the question was whether a statute prohibiting levy and sale of Indian lands prevented a sale for state taxes. The rule of strict construction would have compelled a holding that the property was liable. But Mr. Justice Davis, in speaking for the court, said that 'enlarged rules of construction are adopted in reference to Indian treaties.' He quoted from Chief Justice Marshall, who said that 'the language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of susceptible of a more extended meaning. * * *' Again, in *Jones* vs. *Meehan,* 175 U. S. 1, it was held that 'Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.' In view of the universality of this rule, Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor in determining the rights granted to the Choctaws and Chickasaws.''

To the same effect are Morrow vs. United States 243 Federal 854, and Chase vs. United States 222 Federal 593, 138 C. C. A. 117.

It has been thoroughly established that the provision in the Allotment Act and in the trust patents, to the effect that the land shall be conveyed free of all charges and

incumbrances means that it shall be conveyed free from taxes imposed under State authority. Thus in the case of Morrow vs. United States, 243 Federal 854, the point involved was whether or not the land of an adult mixed blood Chippewa Indian on the White Earth Reservation in Minnesota patented under the provisions of what is known as the Nelson Act of June 14, 1889, (25 Stat. 642), became after the enactment of the Clapp amendment of June 21, 1906, (34 Stat. 353), subject to taxation by the State of Minnesota. The Nelson Act provided for patents in conformity with the provisions of the General Allotment Act, and the allotments in question had been made prior to the passage of the Act of 1906, which expressly declared that all restrictions as to taxation of allotments held under trust patents were removed.

At page 856, the court states:

> "There is no question that the government may, in its dealings with the Indians, create property rights which, once vested, even it cannot alter. Williams v. Johnson, 239 U. S. 414, 420, 36 Sup. Ct. 150, 60 L. Ed. 357; Sizemore v. Brady, 235, U. S. 441, 449, 35 Sup. Ct. 135, 59 L. Ed. 308; Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941; English v. Richardson, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949; Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; Chase v. U. S., 222 Fed. 593, 596, 138 C. C. A. 117. Such property rights may result from agreements between the government and the Indian. Whether the transaction takes the form of a treaty

or of a statute is immaterial; the important considerations are that there should be the essentials of a binding agreement between the government and the Indian and the resultant vesting of a property right in the Indian.

"That exemption of land from taxation is a property right is established. Choate v. Trapp, supra. That this Indian had taken possession of and was enjoying this land under such an exemption at the time the Clapp Amendment was passed is undisputed. Therefore, if this exemption came to him as a legal right, it had fully vested. It came as such legal right if it rested on the solid basis of a binding agreement."

In his decision the learned trial judge sought to distinguish the case just quoted from on the ground that in that case, Congress had attempted to remove the tax exemption after the trust patent had issued, while in the present case the statute providing for the removing of this exemption was enacted prior to the act authorizing trust patents to the Coeur d'Alene Indians and prior also to the issuance of such patents, and held further that the provisions of the Act of May 8, 1906, must be read into the trust patents. This certainly is construing the statute and the patent most strictly in favor of the United States and against " a weak and defenseless people who are wards of the nation and dependent wholly upon its protection and good faith."

As we read the language of the Circuit Court of Appeals of the 8th Circuit in the above case it was the trust patent given to the Indian and accepted by him which constituted a valid contract and created in him a vested property right, and so in the present case the trust patents to Antelope and Smo when issued to and accepted by them gave them a vested property right to have the land mentioned therein conveyed to them "free of all charge or incumbrance whatsoever" at the end of the twenty-five year period, and as stated in the Morrow case at page 858, this meant in effect, freedom from taxation in the meanwhile. On the same page the court makes the following statement, as to the effect of the trust patent:

> "A trust patent in exact compliance with such understanding and agreement was issued this Indian, and under it he has taken and holds this land. His rights are vested and are impervious to alteration against his will except through the sovereign power of eminent domain. One of these rights was freedom from state and local taxation."

In the present case when these patents were issued the Secretary of the Interior had no more power or authority to deprive the Indians of these valuable property rights some seven years after they had been granted, than Congress had the power to do the same thing by statute in the Morrow case.

The court below seems to have overlooked the clear

distinction between the power of Congress over the vested property rights of Indian wards, and its power over their status as wards and restrictions on their dealing with their property as their own. This distinction is clearly brought out in the case of Choate vs. Trapp, 224 U. S. 665, 56 L. Ed. 941, a case involving the rights of the Choctaw and Chickasaw Indians under the Curtis Act of June 28, 1898, incorporating a previous treaty. This statute and the treaty provided for allotments which should be non-taxable while the title remained in the original allottee, or until the lapse of 21 years and provided further that part of the land could be alienated after one year, another portion after three years, and all of it after five years. May 26, 1908, Congress passed another statute removing all restrictions on sale and incumbrances and providing that allotted land under the Curtis Act should be subject to taxation.

The Court expressly states in its opinion, that it does not appear when the patents to the eight thousand Indians involved in the case issued, but that it was assumed that most, if not all of them, had issued prior to the admission of Oklahoma as a State, on November 16, 1907. At page 672 the Court states:

> "Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent, and, like a grantee in a deed poll, or a person accepting the benefit of a conveyance, bound by its terms, although it was not actually signed by him."

At page 673 the Court states:

"*But the exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation.* The defendant's argument also ignores the fact that, in this case, though the land could be sold after five years it might remain non-taxable for 16 years longer, if the Indian retained title during that length of time. Restrictions on alienation were removed by lapse of time. He could sell part after one year, a part after three years and all except homestead after five years. The period of exemption was not coincident with this five-year limitation. On the contrary the privilege of non-taxability might last for 21 years, thus recognizing that the two subjects related to different periods and that neither was dependent on the other. *The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. Kansas Indians,* 5 Wall. 737, 756; *United States v. Rickert,* 188 U. S. 432.

Gleason vs. Wood, 224 U. S. 679, 56 L. Ed. 947, and English vs. Richardson, 224 U. S. 680, 56 L. Ed. 949, are companion cases to the Choate case, and follow the same rule. In Ward vs. Love County, 253 U. S. 17, 64 L. Ed.

751, the doctrine of the Choate case was reconsidered and reaffirmed, the Court saying:

> "As these claimants had not disposed of their allotments and twenty-one years had not elapsed since the date of the patents, it is certain that the lands were nontaxable. This was settled in *Choate vs. Trapp, supra,* and the other cases decided with it; and it also was settled in those cases that the exemption was a vested property right arising out of a law of Congress and protected by the Constitution of the United States. This being so, the State and all its agencies and political subdivisions were bound to give effect to the exemption."

In the case of Williams vs. Johnson, 239 U. S. 414, 420, 60 L. Ed. 358, the Court had to deal with restrictions on alienation, and expressly recognized the distinction established by the Choate case.

The conclusion to be drawn from these decisions is that under the wording of the trust patent and section 5 of the General Allotment Law quoted above, the exemption from taxation promised in the clause declaring that the United States would convey the land free from incumbrances and charges was a property right which vested in the Indian upon his acceptance of the patent, while the provision that title should be held in trust by the United States for twenty-five years for the benefit of the Indian, was merely a restriction upon his power of alienation which the Secretary of the Interior, by de-

claring him competent to manage his own affairs, could remove. But surely the Coeur d'Alene Indians who accepted the patents conferring this clear exemption from taxation should not be held to have acquired a right merely to hold the land free from taxation until such time as the Secretary of the Interior of his own motion, and without consulting their wishes, should decide that they were to be deprived of the right.

For these reasons we do not think that the learned trial judge was justified in holding that the provisions of the Act of May 8, 1906, should be read into the trust patents and on the contrary, we feel that the above authorities clearly establish that the exemption from taxation was a vested property right conferred upon these Indians by their trust patents and that it could not be taken from them either by an Act of Congress or by an executive officer acting under the discretionary power conferred upon him by an Act of Congress.

POWER OF SECRETARY UNDER ACT OF MAY EIGHTH, NINETEEN HUNDRED SIX.

If the trust patents conveyed vested rights to the Indians Antelope and Smo, they could not, of course, be deprived of such rights either by Congress or by the Secretary of the Interior, but in view of the fact that the court below held that such rights as these Indians acquired under their trust patents were subject to the power of the Secretary of the Interior under the Act of May 8, 1906 (34 Stat. 182), amending Section six of the

General Allotment Act, we must consider what power and authority was intended to be conferred and was conferred upon that officer by the Act in question. The learned District Judge held that "Congress intended to confer upon the Secretary of the Interior the unqualified authority within his sound discretion, to declare an Indian competent and to issue to him a patent in fee." We feel that in view of the evil intended to be remedied by this statute, and its purpose as shown by the committee reports and the debate at the time of the passage of this Act, and in the light of the liberal construction which the courts give to statutes and treaties dealing with the rights of Indians, it must be held that Congress merely intended that the discretionary power conferred upon the Secretary of the Interior, to declare an Indian competent and issue to him a patent in fee, should be exercised only upon application by such Indian, and that where the declaration was made and the patent issued without consulting the Indian, there was no intention that he should be deprived of valuable property rights without his consent, and accordingly the patent should only become effective upon its acceptance.

The Act of May 8, 1906, is frequently referred to as the Burke Act, and before its passage an Indian who wanted to be relieved from the restrictions on alienation and to obtain patent in fee for the land in his allotment prior to the expiration of the trust period, had to obtain the passage of a special Act of Congress, in order to accomplish this purpose.

In its report on this Bill the Committee on Indian Affairs states (No. 1998, 59th Congress):

> "In the opinion of the Committee this provision is advisable, as it will make it unnecessary for legislation granting fee simple patents to individual Indian allottees, as has been done in every session of Congress for several years, and it places the responsibility upon the Secretary, and the Indian Department, who know best when an Indian has reached such a stage of civilization as to be able and capable of managing his own affairs."

In a letter from the Commissioner of Indian Affairs to the Secretary of the Interior, dated February 8, 1906, which is included in the above report, the following statement is made with reference to this provision:

> "In the past the Indian Office has made many recommendations for special legislation authorizing you to gratify the aspirations of individual Indians for citizenship by issuing to them patents in fee for their lands; but, as a fundamental principle of good government special legislation should be avoided and both the Department and members of Congress relieved of the importunities of interested parties for enactment designed to benefit only themselves.
>
> "The proposed amendment will not only substitute general for special legislation, but for those allottees who are not fitted for the responsibilities of citizenship it will provide a probationary period

during which any who have both the ability and the ambition may prepare themselves for the desired change."

On the date the bill was passed the following reference to it is found in the Congressional Record:

"Mr. Dixon of Montana: Mr. Speaker, I want to ask the gentleman from South Dakota (Mr. Burke) if the purpose of the bill is not to prevent the blanket Indians by wholesale becoming citizens by allotment, and still allow the intelligent Indians *on application* to become citizens by allotment?

"Mr. Burke, of South Dakota: That is the purpose of the law, and further, to protect the Indians from the sale of liquor."

If we construe this statute liberally in favor of the Indian in accordance with the rule laid down by the Supreme Court of the United States in the case of Choate vs. Trapp, 234 U. S. 665, 675, in the passage quoted above, and in the other cases which we have cited, it must be held that Congress did not intend that these valuable property rights should be taken from the Indians without their consent, and that the entire purpose and intent of the statute was to enable competent Indians who desired to obtain patents in fee, to do so without having to resort to special legislation. The right to have the land included in a trust patent held free and clear from the burdens of taxation for State and County pur-

poses for a period of twenty-five years is a property right and a valuable one. That it is a property right is established by the case of Choate vs. Trapp, Gleason vs. Wood, English vs. Richardson, Ward vs. Love County, and Morrow vs. United States, cited above. The value of such right is illustrated by the facts shown by those cases, and by the stipulation of facts in the record here (Tr. pp. 39). It appears that the total taxes against the Smo land for four years amounted to $1135.82, and against the Antelope land to $1536.22, or an average yearly tax of $283.95 in the one case and $384.05 in the other. When the fee patents issued in 1916, the trust period had eighteen years yet to run and on the above average, the total tax burden during this period would amount to $5117.10 in the Smo case, and $6894.90 in the Antelope case. Before such burdens are placed upon Indian wards without their consent, the language of the statute and the intent of Congress should be so clear and convincing as to admit of no possibility of doubt.

We have already shown that the purpose of the statute was to provide a convenient and practicable method for determining the competency of Indians who desired to be declared competent, and thus to enable such Indians to obtain full control over their lands and to become subject to the corresponding burdens, and under the established rule of construction relating to property rights of Indians, we think it should be held that the statute was the extension of a benefit to the Indian, in the nature of a privilege or election, to have the trust period of his al-

lotment curtailed upon his application provided the Secretary of the Interior in the exercise of his discretion, having in mind the trusteeship of the Government so that incompetent Indians might not waste their heritage, should find the Indian in question to be competent and capable of managing his own affairs. Otherwise, the effect of the statute would necessarily be to authorize the Secretary of the Interior to destroy valuable property rights of Indians without their consent. If such rights had fully vested as we argued in the forepart of this brief, it is obvious that no such power could have been conferred upon the Secretary, but if as urged by the learned Trial Court, the right acquired by these Indians was subject to the limitations contained in the Burke Act of May 8, 1906, nevertheless, we submit that this Act should not be so construed as to permit the Indian to be deprived of this valuable property right without his consent.

We do not think that the "Declaration of Policy" referred to by the court (Tr. pp. 58-61) or the Departmental correspondence (Tr. pp. 44-56) show that the Interior Department has construed this Act to give the unqualified discretion to the Secretary of the Interior to issue fee patents against the wishes of individual Indians. In fact the contrary is conclusively shown by the record here, because the patents in question were rejected by the Indians, and later canceled by the Secretary. Furthermore, since the letter of November 23, 1920, (Tr. p. 57) declarations of competency have only

been made and fee patents issued upon application by the Indians. Previously to that time it seems that the recommendations of the competency commissions were acted upon in many cases without application by the Indian and in such cases where the Indian declined to accept the patent, it has in course of time been canceled.

Another argument advanced by the court is that of inconvenience to the various communities, because of being unable to tax Indian lands. We do not think any great weight should be given to this argument because the Supreme Court of the United States in the recent case of Irwin vs. Wright, 258 United States 219, 66 L. Ed. ---------- decided March 20, 1922, rejected a similar argument based upon a much stronger state of facts. In that case the Supreme Court held that reclamation homesteads, after the preliminary proof of residence and cultivation required under the general homestead law, were nevertheless not taxable until the final proof of reclamation of half the land had been made and final certificate issued, and this holding was made, notwithstanding the fact that five or ten years might intervene between these proofs in which no residence was required and in which the land could be freely sold or incumbered. It should be noted that in this decision the Supreme Court of the United States declined to follow the decision of Judge Dietrich in the case of the United States vs. Canyon County 232 Federal 985, and the decision of the Supreme Court of Idaho in Cheney vs. Minidoka County 26 Idaho 471, both of which decisions were

based, in part at least, upon the same argument of inconvenience that is advanced in the decision here appealed from.

For these reasons we believe that under a proper construction of the Burke Act of May 8, 1906, the power of the Secretary of the Interior is limited to declaring an Indian competent and issuing him a fee patent in cases where the Indian makes application for this purpose, and that when in a case like the present, a fee patent is issued without previous application, it does not become effective until acceptance, and if it is rejected the Secretary has the power of cancellation. This brings us to a consideration of the necessity of acceptance of a fee simple patent to Indian lands by the Indian himself in order to make it effective for any purpose.

FEE PATENTS TO INDIANS REQUIRE ACCEPTANCE TO MAKE THEM EFFECTIVE.

At page 66 the court dismisses the argument advanced on behalf of the Indians that the patents were never accepted, by stating the general rule applicable to public land cases that a patent is effectual without actual physical delivery, citing the leading case of United States vs. Schurz, 102 United States 378, and United States vs. Laam 149 Federal 581. This holding leaves out of consideration the well established distinction between "Indian lands" and "public lands" generally, and gives no consideration to the fact that the ordinary public land patent is issued on application by the entryman while

these patents were issued without previous application and without previous consent. In the public land case the contract is complete when the entryman's offer is accepted and the patent is issued, while in the present case the fee patents were issued without application by the Indian and instead of there being an offer by the Indian and an acceptance by the United States, the offer was made by the United States and the Indians promptly and unequivocally rejected the offer and declined to enter into the contract. After all a patent from the Government in the ordinary public land case is nothing more than an executed contract, and as such it is based upon the fundamental requirement of the law of contracts that there must be both an offer and an acceptance to constitute a contract. The same would be true in the case of an Indian holding a trust patent who made application for a fee patent. But the Indians Smo and Antelope made no such application, and their rights were governed by their trust patents evidencing the original contract until such time as they entered into a new contract. Under these circumstances, the patent issued by the Government was a mere offer and of no force or effect until accepted by them.

This construction seems to us to be amply supported by the decision of the Supreme Court of the District of Columbia in the case of United States, ex rel. Prettybull vs. Lane, 47 App. D. C. 134. This was an action for writ of mandamus against the Secretary of the Interior. Relator was a Yankton Sioux and the lands involved had

been allotted under the Act of February 8, 1887, but the precise date of the allotment does not appear. On April 28, 1916, the Secretary under authority of the Act of May 8, 1906, adjudicated the Indian competent and directed the issuance of patent in fee. This patent was duly signed, countersigned, sealed, and recorded in the book of patents at Washington, and appellant was notified that the Secretary of the Interior would be at the agency on May 13, 1916, to deliver the patent. Upon his arrival at the agency, however, the Secretary discovered that certain misrepresentations had been made as to the competency of the Indian, and he accordingly declined to deliver the patent on the ground that he had been falsely and fraudulently induced to believe that the Indian was competent. The court declined to issue the writ of mandamus and so far as we are able to ascertain no attempt was made to review the decision. This decision is directly contrary to the decision in United States vs. Schurz, 102 United States 78, unless we accept the distinction between public land cases and Indian cases, because in the Schurz case a patent had issued for land covered by a valid townsite claim due to some mistake or inadvertence, and before delivery the Secretary attempted to recall the patent. However, a writ of mandamus issued and was sustained by the Supreme Court of the United States compelling him to deliver the patent.

The courts have held in a number of cases that a broad distinction is to be recognized between "Indian lands" and "public lands." In the case of Northern Pacific

Railway Company vs. United States, 227 United States 355, at page 366 the court said:

> "The Court of Appeals expressed the view that the rule that resolves doubts in favor of the patent issued by the United States does not apply in such case, citing *Leavenworth Railroad Co.* v. *United States,* 92 U. S. 733; *Stewart* v. *United States,* 206 U. S. 185; *Minnesota* v. *Hitchcock,* 185 U. S. 373. Much can be said in support of that view. It must be borne in mind that the Indians had the primary right. The rights the Government has are derived through the cession from the Indians. If the Government may control the cession and control the survey and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter but as effectual as fraud. We should hesitate to put the Government in that attitude. It rejects that atitude and accepts a greater responsibility. It yields to the rule which this court has declared—*that it will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in al' cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.'* 119 U. S. 1; 175 U. S. 1. *United States* v. *Winans, supra.*"

The court goes on to hold that the appellants were not within the provision of an express statute of March 2, 1896, limiting the time within which an action might be brought to annul a patent, and held that this act only applied to public lands of the United States and did not apply to Indian lands.

In the later case of La Roque vs. United States 239 U. S. 62, the court reaffirmed this doctrine, saying at page 68:

> "The suit was brought between six and seven years after the date of the trust patent, and because of this it is urged that the suit was barred by paragraph 8 of the Act of March 3, 1891, c. 561, 26 Stat. 1099 (see also c. 559, p. 1093) which provides that 'suits by the United States * * * to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.' This contention must be overruled upon the authority of *Northern Pacific Ry.* v. *United States* 227 U. S. 355, 367, where it was held that this section is part of the public land laws and refers to patents issued for public lands of the United States. This trust patent was not issued for public lands of the United States, but for reserved Indians lands to which the public land laws had no application. And it may be well to observe in passing that the Circuit Court of Appeals directed that there be embodied in the decree a provision that the Government holds the lands in the same way it held them before the

patent was issued, that is, as reserved Indian lands."

See also Ash Sheep Company vs. United States, 252 U. S. 159, where, after an elaborate consideration the court held that the lands in question were "Indian lands" and not "public lands."

Under these authorities it seems entirely clear that the rule applying to patents to public lands should not be applied to fee patents to Indian lands issued without previous application by the Indian, because to do so disregards the clear distinction between Indian lands and public lands and also violates one of the most fundamental principles of the law of contracts that in order to constitute a contract between two parties, an offer and an acceptance is necessary. Certainly this rule should not be abrogated in a case between the all powerful Government of the United States and an Indian who had theretofore been in the position of a mere ward of the Government. In this connection we might also call attention to the fact that the Counties and their officers who are appellees here are not parties to the contract, and that another fundamental principle of the law of contracts is that a contract can be rescinded or annulled by consent of the parties thereto.

For these reasons we respectfully submit that the fee simple patents were not effective to render the lands subject to taxation until acceptance by the Indians, that the trust patents issued in 1909 gave the Indians a vested

property right to have their lands held free from taxation for the period of twenty-five years and at the end of that period to have them conveyed by the United States free from all burdens imposed by State or local authorities by way of taxation, and that the Burke Act of May 8, 1906, conferred no power upon the Secretary of the Interior to declare an Indian competent and issue to him a fee patent without the consent of such Indian, but rather, it merely authorized the Secretary of the Interior, in the exercise of his discretion to declare an Indian competent and issue him a fee patent upon the application of such Indian. Accordingly we respectfully submit that the decree of the learned Trial Court should be reversed and that the mandate of this court should direct that decrees be entered cancelling the taxes and tax certificates described in the record.

Respectfully submitted,

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Solicitors for Appellant.

No. 3985.

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED CAUSES.

UNITED STATES OF AMERICA,

Appellant.

vs.

BENEWAH COUNTY, IDAHO, A. C. WUNDERLICK, C. A. WALKER, W. R. ARMSTRONG, and F. H. TRUMMEL,

and

KOOTENAI COUNTY, IDAHO, HANS JOHNSON, J. W. McCREA, FRANK A. MORRIS, and S. H. SMITH,

Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

ROBERT E. McFARLAND,
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Residence, St. Maries, Idaho.

ROGER G. WEARNE,
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Solicitors for Appellees.

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Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

STATEMENT OF THE FACTS

The Appellees have no fault to find with Appellant's Statement of the Case, and hereby adopt it as their own.

BRIEF OF THE ARGUMENT.

1. The treaty with the Coeur d'Alene Indians does not prevent the operation of the act of May 8, 1906, (34 Stat. 182). Lone Wolf vs. Hitchcock, 187, U. S. 553. 47 Law Ed. 299.

2. The policy of the government is, as soon as pract-

icable to invest the Indian with full rights of citizenship and to terminate the relation of guardian and ward heretofore existing between the government and the Indians.

Declaration of Policy in the administration of Indian Affairs (Tr. pp. 58-61), Departmental Correspondence Tr. pp. 44-57)

3. Adjudication by the Secretary of the Interior of the Indians' competency and the subsequent issuance of patent with tender thereof to the Indians operated to convey the legal title and to relieve the government of its trust, and the fact that there has never been an actual physical delivery of the patents to the grantees is not of controlling importance.

U. S. v. Schurz, 102 U. S. 378. 26 Law. Ed. 167.

U. S. v. Laam, 149 Fed. 581.

ARGUMENT.

Although Appellant relies for a reversal of the judgment in this case upon four assignments of error, its contentions may be stated in two propositions, namely:—

1. That under the Act of May 8, 1906, giving the Secretary of the Interior authority to issue patents in fee to Indians when he should find and declare such Indians competent, the Secretary could not issue such patent in the case of the Coeur d'Alene Indians before the expiration of the twenty-five year trust period provided in the Treaty of the United States with that tribe, for the reason that such premature issuance of patent would infringe a vested right of the Indians to have lands therein held in

trust by the United States free from all charge and encumbrance for twenty-five years.

2. That the issuance of the patent in fee was inoperative because there was no delivery to or acceptance by the patentee.

The Treaty with the Coeur d'Alene Indians does not prevent the operation of the act of May 8, 1906 for the reason that Congress possesses a paramount power over the property of Indians by reason of its exercises of guardianship over their interest and such authority might be implied even though opposed to the strict letter of a Treaty with the Indians. The following opinion as delivered by Mr. Justice White in the case of Lone Wolf vs. Hitchcock, supra, is of vital importance to the case at bar.

> "The Appellants base their right to relief on the proposition that by the effect of the Article just quoted the Confederated Tribes of Kiowas, Comanches and Apaches were vested with an interest in the lands held in common within the reservation which interest could not be devested by Congress in any other mode than that specified in the said twelfth Article and that as a result of the said stipulation, the interest of the Indians in the common lands fell within the protection of the Fifth Amendment to the Constitution of the United States as such interest—indirectly at least—came under the control of the Judicial Branch of the government. We are unable to yield

our assent to this view. The contention in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when a necessity might be urgent for a partition and disposal of the tribal lands of all power to act if the assent of the Indians could not be obtained. Now, it is true that in decisions of this Court, the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred or as sometimes expressed as sacred as the fee of the United States in the same lands.

But in none of these cases was there involved a controversy between Indians and the government respecting the power of Congress to administer the property of the Indians. The questions considered in the cases referred to, which either directly or indirectly had relation to the nature of the property rights of the Indians, concerned the character and extent of such rights as respected states or individuals. In one of the cited cases it was clearly pointed out that Congress possessed a paramount power over the property of the Indians, by reason of its exercise

of guardianship over their interests, and that such authority might be implied even though opposed to the strict letter of a treaty with the Indians. * *

But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties neither of whom derives title from the Indians. * *

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties, were entered into between the United States and a

tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. * *

After an experience of a hundred years of the treaty-making system of government Congress has determined upon a new departure,—to govern them by acts of Congress. This is seen in the act of March 3, 1871, 'No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3d, 1871, shall be hereby invalidated or impaired.' ''

At the time Congress passed the act of May 8, 1906 it cannot be denied that the relationship of the government towards the Indians was that of guardian and ward. Such being the case, Congress must necessarily have had the power of performing the acts of guardianship, and to that end must necessarily have had the power to make all laws and regulations necessary to the end, with or without the consent of its Indian wards.

The policy of the government is, as soon as practicable to invest the Indian with full rights of citizenship and to

terminate the relation of guardian and ward heretofore existing between the government and the Indians. In the Declaration of Policy in the administration of the Indian Affairs, supra, we find the following:—

> "The time has come for discontinuing guardianship of all competent Indians and giving even closer attention to the incompetent that they may more speedily achieve competency.
>
> Broadly speaking a policy of greater liberalism will henceforth prevail in Indian administration to the end that every Indian, as soon as he has been determined to be as competent to transact his own business as the average white man, shall be given full control of his property and have all his lands and moneys turned over to him, after which he will no longer be a ward of the government."

Referring to the letter written by W. A. Mundell January 14, 1919, (Tr. pp. 53-55) commenting on the Declaration of Policy in the administration of Indian affairs supra, he wrote:—

> "The effectiveness of the Declaration of Policy promulgated April 17, 1917 is apparent from the number of fee patents that have been issued during the calendar year. * *
>
> The Competency Commission began work in 1915. Some of the work done by them is now being done over so that more satisfactory results may be obtained. The general rule is that the competent Indian does

not want a patent in fee nor to be declared competent, for he then has to bear his share of the burden of taxes. The greatest number of Indians have been declared competent since 1916 and this is due in a great measure to the Declaration of Policy."

From the foregoing it is apparent that in many instances Indians who were really competent and qualified for admission to citizenship did not desire to be so declared for the reason that citizenship would bring attendant responsibilities and obligations; hence the necessity for the exercise of its inherent power by the government in the bestowal of citizenship with the attendant responsibilities upon those Indians found to be competent to receive the same. The Declaration ends with this paragraph:—

"This is a new and far-reaching Declaration of Policy. It means the dawn of a new era in Indian administration. It means that the competent Indian will no longer be treated as half ward and half citizen. It means reduced appropriations by the government and more self-respect and independence for the Indian. It means the ultimate absorption of the Indian race into the body politic of the nation. It means in short the beginning of the end of the Indian problem."

Without going into detail it is to be said that a perusal of the departmental correspondence and documents leaves no doubt but that the view of the Department was

that a competent Indian should be so adjudged whether he so desired or not.

We further take the position that Congress having by act of May 8, 1906 conferred upon the Secretary of the Interior the power to declare an Indian competent and to issue to him a patent in fee for his allotted lands, and the Secretary of the Interior acting under the authority of said act having duly and regularly found the Indians herein named to be competent and having caused the issuance of a patent in fee to each of said Indians and having tendered the same to them, vested in said Indians title in fee to said lands; and the fact that said Indians did not accept said patents and that there had never been an actual physical delivery of the same to said Indians did not render said patents inoperative. In the case of

U. S. vs. Schurz, supra, (page 397) Mr. Justice Miller said:—

> "We are of opinion that when, upon the decision of the proper office that the citizen has become entitled to a patent for a portion of the public lands, such a patent is in that office made out and signed by the President and when the seal of the United States is affixed to the instrument countersigned by the Recorder of the Land Office, and duly recorded in the Record Book kept for that purpose, it becomes a solemn public Act of the Government of the United States and needs no further delivery or other authentication to make it perfect and valid. This in such

> case the title to the land conveyed passes by matter of record to the grantee, and that delivery as in cases of deeds of private individuals is not necessary to give effect to the granting clause of the instrument. The authorities on this subject are numerous and they are uniform. They have their origin in the decisions of the English Courts upon the grants of the Crown evidenced by instruments called there, as here, 'patents.' ''

Having the foregoing opinion in mind it must be concluded that when said Indians were duly and regularly declared by the Commissioner of Indian affairs to be competent it was incumbent upon the Secretary of the Interior to issue patents in fee to them and the issuance of said patent by the Secretary by reason of said Declaration of Competency, and the signing by the President of said patent, vested the title in fee in said Indians to the lands therein described.

Of the many authorities cited by Counsel for Appellant, we have been unable to find any which, in our opinion, are of controlling importance in sustaining Appellant's contention. The decision of the eminently able Court before whom this cause was tried, dismissing Appellant's Bill of Complaint, is a very logical and exhaustive analysis of the principles involved herein and in support of our contention we cite the following decision of the Honorable F. S. Deitrich, rendered in this consolidated cause, under date of September 16, 1922 as follows:

"DIETRICH, District Judge:

In respect to the questions in issue these two cases are identical, and they have been submitted upon the same general stipulation of facts. Each is brought upon behalf of a Coeur d'Alene Indian, to test the validity of claims for taxes levied by the state officers upon lands belonging to the Indian. And the fundamental question is whether, when the taxes were levied, the Government still held the title in trust for the benefit of the Indians, or such trusteeship had been terminated by valid fee patents. The lands were formerly a part of the Coeur d'Alene Indian Reservation and were allotted, in the one case to Maurice Antelope and in the other to Anasta Williams Smo, 1[illegible]0 acres to the former, and 160 acres to the latter. The provision under which the allotments were made is to be found in the appropriation act of June 12, 1906. (34 Stat. 325,335), and is as follows:

"That as soon as the lands embraced within the Coeur d'Alene Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments to the same to be made to all persons belonging to or having tribal relations on said Coeur d'Alene Indian Reservation, to each man, woman, and child, 160 acres, and upon the approval of such allotments by the Secretary of the Interior he shall cause patents to issue therefor in-

der the provisions of the general allotment law of the United States.'

In pursuance of the authority thus conferred upon the Secretary of the Interior, he caused the lands in question to be allotted to the Indians above named, and issued "Trust patents" to them on the 16th day of December, 1909. These trust patents contained the oridnary provisions of such instruments, one of which was a declaration that the Government would "hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust, for the sole use and benefit" of the grantee.

Recently prior to the passage of this act, namely, on May 8, 1906, the general allotment act of February 8, 1887, (24 Stat. 388), and particularly Section 6 thereof, had been amended, to read as follows:

"Sec. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and

who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: Provided, that the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, that until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: And provid-

ed further, that the provisions of this Act shall not extend to any Indians in the Indian Territory." (34 Stat. 182.)

When, therefore, in the Act of June 21, 1906, supra, authorizing the allotment of the Coeur d'Alene Reservation, the Secretary of the Interior was directed "to cause patents to issue under the provisions of the general allotment law of the United States," reference must have been intended to the Act of 1887, as amended by this Act of May 8, 1906, and accordingly the trust patents here involved were issued expressly 'subject to all statutory provisions and restrictions," including, of course, the provision of this last named act authorizing the Secretary, in his discretion, to adjudge an allottee competent and to issue to him patent in fee prior to the expiration of the twenty-five year period. Assuming to act under the authority of this provision, the Secretary, in 1916, (so it is stipulated), "duly and regularly declared" the two allottees " to be competent," and thereupon issued to them "patents in fee" for the lands in controversy, but they refused and still refuse to accept them. It is further stipulated that, pursuant to the statutes of Idaho, the lands were duly and regularly assessed for taxes for the years 1917 to 1920 inclusive, during which period neither the fee patents nor the order or judgment of the Secretary of the Interior adjudging the Indians competent had

ever been revoked. It is further stipulated that on or about January 6, 1921, the Secretary of the Interior revoked the patents, but we are not advised of the circumstances of or reasons for such revocation. It is also stipulated that during the period the fee patents were outstanding, that is, from 1916 to 1921, "the Department of the Interior treated the said Maurice Antelope and Anasta Williams Smo as citizen Indians, and that the defendants (in levying taxes and taking proceedings to enforce the payment of the same) proceeded upon "the assumption that the Indians were competent and held title in fee simple to the lands. During this period the Indians did not alienate or attempt to alienate any of the lands, with the exception that Antelope sold to one of the defendant counties, and executed to it a deed for, a right of way for a public highway, for a consideration of $125.00. The other county defendant secured a right of way across the land of Smo by proceedings in eminent domain, in which Smo, as defendant, was treated as a competent party, and was paid $140.00 as compensation for the right of way.

It is not disputed that so long as the Government held the title in trust, the lands were exempt from taxation, and therefore, upon the facts as stipulated, there would seem to be but a single question left to decide:—Did the abjudication by the Secretary of the Indians' competency and the subsequent issuance

of patent, with tender thereof to the Indians, operate to convey the legal title, or at least to relieve the Government of its trust? The mere fact that there has never been an actual physical delivery of the patents to the grantees is not of controlling importance, for it is familiar law that a patent may be effective without actual delivery. United States v. Schurz, 102 U. S. 378. United States v. Laam, 149 Fed. 581.

With much apparent confidence the Government relies upon Morrow v. United States, 243 Fed. 854, but upon analysis of the record here it will be seen that the case has little, if any, application. In substance it is there held that a trust patent, together with the provisions of pertinent statutes in force at the time the patent is issued, constitutes a contract between the Indian and the Government, and vests in the former rights of which he can not be divested without his consent, and that therefore it was incompetent for Congress to change the property status established by the trust patent and the provisions of existing statutory law, over the objection of the Indian patentee. The act involved in that case, by which is was attempted to shorten the trust period, and hence to deprive the Indian of the valuable right of having his property exempt from taxation, was passed after the issuance of the trust patent. Here, as we have seen, the trust patents were issued by the Secretary of the Interior in pursuance of an act pro-

viding that they should issue "under the provisions of the general allotment law of the United States," and at the time of such authorization, and thereafter when the allotments were made and the trust patents were issued, the general allotment law of the United States expressly vested in the Secretary of the Interior the discretion, and he was authorized, whenever he was satisfied that an allottee was competent and capable of managing his own affairs, to cause to be issued to him a patent in fee simple. And there was the further provision that after the issuance of such fee patent "all restrictions as to sale, incumbrance, or taxation" of the land was removed. If, therefore, we apply the doctrine of the Morrow case, we must read into the trust patents here involved these provisions of law, by which apparently the Secretary of the Interior was authorized in his discretion to shorten the trust period, and by accepting the trust patents the patentees assented to the exercise of such authority as is thus conferred upon the Secretary.

The other contention of the Government is that the power of the Secretary of the Interior to adjudge an Indian competent in any specific case and to issue to him a patent, is conditioned upon the consent of such Indian and the acceptance by him of the patent. But in this view I am unable to concur. In considering the question it will be borne in mind that there is no suggestion of fraud or mistake on the part of

the Secretary of the Interior, or of irregularity in the proceedings leading up to the issuance of the patent, and the question therefore is strictly one of the power of the Secretary under the amendatory act of May 8, 1906. It will be noted that the language of the act is "that the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple." Neither expressly nor inferentially does this language disclose an intent that the power thus conferred is confined to cases where the allottees make application or otherwise give their assent. Nor is it suggested either by the status of the Indians or the general and well-known policy of the Government in respect to them. They are wards, in a state of tutelage, and presumably are not competent always to choose what is for their good. Moreover, if, as has been the policy of the Government, the Indians are to be encouraged to adopt the institutions and conform to the habits of civilized life, it is important in their case, as in the case of white people, that they possess the power to impose upon all alike the burdens of maintaining such institutions. As in other communities, so civilized Indians must have roads and schools, and police protection, and these benefits cannot ordinarily be had

without taxation. If in a community of capable Indians the majority desire thus to create for themselves the conditions of civilized life, they might very well be unable to proceed if an unprogressive minority has the power to withhold their lands from taxation. The Government, too, would thus be greatly hampered in carrying out its policies, and that these considerations were in the mind of the Secretary when these patents were issued is not open to doubt. The policy of emancipating capable Indians from guardianship and investing them with the rights and responsibilities of citizenship and giving them complete control of much of their property had long been in force. The Department maintained standing Competency Commissions, whose duty it was to go about and make investigation of the capacity and competency of individual Indians, upon the various reservations, and to report their conclusions with recommendation, in order that, when the facts warranted, the competency of such individuals might be adjudged without unnecessary delay and patents in fee simple issue, for the purpose of relieving the Government from the duties of guardianship, and imposing upon such competent Indians the responsibility of caring for themselves, and of putting it within the power of communities to tax local property, in carrying out the enterprises and maintaining the institutions of civilized life. Such strength had this

view obtained that early in the year 1917, but a few months after the issuance of the fee patents here in question, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, issued a formal "DECLARATION OF POLICY IN THE ADMINISTRATION OF INDIAN AFFAIRS," as of date April 17, 1917, from which we quote the first three paragraphs:

"During the past four years the efforts of the administration of Indian affairs have been largely concentrated on the following fundamental activities—the betterment of health conditions of Indians, the suppression of liquor traffic among them, the improvement of their industrial conditions, the further development of vocational training in their schools, and the protection of the Indians' property. Rapid progress has been made along all these lines, and the work thus reorganized and revitalized will go on with increased energy. With these activities and accomplishments well under way we are now ready to take the next step in our administrative program.

"The time has come for discontinuing guardianship of our competent Indians and giving even closer attention to the incompetent, that they may more speedily achieve competency.

"Broadly speaking, a policy of greater liberalism will henceforth prevail in Indian administration, to the end that every Indian, as soon as he has been

determined to be as competent to transact his own business as the average white man, shall be given control of his property and have all his lands and moneys turned over to him, after which he will no longer be a ward of the Government."

The Declaration ends with this paragraph:

"This is a new, far-reaching declaration of policy. It means the dawn of a new era in the Indian administration. It means that the competent Indian will no longer be treated as half ward and half citizen. It means reduced appropriations by the Government and more self-respect and independence for the Indian. It means the ultimate absorption of the Indian race into the body politic of the nation. It means, in short, the beginning of the end of the Indian problem."

Without going into detail, it is to be said that a perusal of departmental correspondence and documents leaves no doubt of the view of the Department that the Secretary had the authority, under the act of May 8, 1906, at any time, within his discretion, to declare the competency of an Indian and to issue to him a fee patent without his consent, or of the further view that such authority was indispensable to the successful execution of governmental policies touching the well-being and civilization of the Indians.

If then in the successful execution of well-known

governmental policies toward the Indians, it is essential that the Secretary of the Interior be clothed with such authority, and the Act of May 8, 1906, seems expressly to confer it, and in the administration of Indian affairs the executive officers have for many years assumed that such was the legislative intent, upon what theory are we to adopt a contrary view? Such power touching the property rights of Indian wards is not exceptional; it is rather the rule. By the original allotment act itself (24 Stat. 388), upon the refusal or failure of an adult Indian to select an allotment, the Secretary is authorized to make the selection for him (Sec. 2). So after lands are allotted the Secretary may, without the consent of the allottees, grant rights of way. Act May 3, 1901, 31 Stat. 1083. Act May 6, 1910, 36 Stat. 349. Act March 2, 1917, 39 Stat. 973. By the Act of January 26, 1895, as amended April 23, 1904, (28 Stat. 641, and 33 Stat. 297), the Secretary is authorized to correct mistakes in the issuance of trust patents by canceling the same. By Section 5 of the general allotment act, the President is authorized to extend the trust period beyond twenty-five years. It will hardly be suggested that before he can do this in any particular case he must have the consent of the Indian allottee. But is there not quite as much reason there as here for interpolating a provision requiring the Indian's consent? In case of the death of an In-

dian before final patent the Secretary may ascertain the heirs, and if he regards them as competent he "shall issue" to them patents in fee simple; but if they are incompetent the lands may be sold and the proceeds held in trust for them. Act May 29, 1908, 35 Stat. 444. Act June 25, 1910, 36 Stat. 855. Act May 18, 1916, 39 Stat. 127. By act of October 19, 1888, Section 2, (25 Stat. 612), one allotment may be exchanged for another, but the consent of the Indian interested is expressly required. Why not a similar requirement here if Congress so intended?

Upon a consideration of the whole case I have been unable to escape the conclusion that Congress intended to confer upon the Secretary of the Interior the unqualified authority, within his sound discretion, to declare an Indian allottee competent, and to issue to him a patent in fee, and that such power may be exercised without infringing any vested right of the Indian, because such was the law at the time the allotments here involved were made and the trust patents issued.

Whether the attempted revocation of the fee patents by the Secretary in 1921 was or was not effective we need not now decide; there is no suggestion in the record of the ground upon which the action was taken. By express stipulation, in the year 1916 the two Indian allottees were duly and regularly declared by the Secretary of the Interior to be com-

petent, and thereupon the patents in fee issued. If, as we hold, the Secretary had the power to take such action without the consent of allottees, these two Indians had the status of citizens, and they were possessed of the complete title in fee simple to these lands during the entire period covered by the tax proceedings now assailed. It must therefore be held that under the provisions of the Act of May 8, 1906, the lands were subject to taxation and the taxes in question are valid. Accordingly the bill of complaint in each case will be dismissed with prejudice.

Endorsed. Filed Sept. 18, 1922.

W. D. McREYNOLDS,

Clerk."

In our opinion based upon the authorities above cited and upon the opinion of the Honorable F. S. Deitrich, Judge of the Court below the judgment should be affirmed.

Respectfully submitted,

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